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Supreme Court, U.S.
FILED
MAY 8 1996
CLERK

No. 95-974

In The
Supreme Court of the United States
October Term 1995

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed December 20, 1995
Certiorari Granted March 25, 1996

216 PP

TABLE OF CONTENTS

Dockets:

District Court Docket #: 88-CV-1854	1
Ninth Circuit Docket #: 90-15546	6
Ninth Circuit Docket #: 92-17087	11

Other Materials In Chronological Order:

Loyalty Oath of Maria-Kelly Yniguez	20
1988 General Election Voter Publicity Pamphlet	22
Affidavit of Maria-Kelly Yniguez	44
Plaintiff's Statement of Facts	49
Answers to Plaintiff's Interrogatories and Requests to Admit	53
Second Amended Complaint	55
Arizona Attorney General Opinion I89-009	61
Excerpts from Reporter's Transcript, February 13, 1989	77
Excerpts from Reporter's Transcript, April 27, 1989	89
Citation to Decision on the Merits of the District Court	92
Judgment of the District Court	93
Motion to Intervene by Arizonans for Official English, and Memorandum in Support of Motion	94
Plaintiff's Response to Motion to Intervene	103
Reply in Support of Motion to Intervene by Arizonans for Official English	114
Excerpts from Reporter's Transcript, March 26, 1990	123
Decision by District Court, 130 F.R.D. 410	138
First Notice of Appeal by Arizonans for Official English	150
Plaintiff Gutierrez's Notice of Appeal	152

Affidavit of Cameron Whitman	153
Decision on Intervention Motions by Ninth Circuit, 939 F.2d 727	157
Notice of Decision on Intervention Motions by Ninth Circuit	185
State's Suggestion of Mootness	187
Response to Suggestion of Mootness by Arizonans for Official English	188
Reply to Suggestion of Mootness by Yniguez	194
Citation to Decision on Mootness by the Ninth Circuit	205
Second Notice of Appeal by Arizonans for Official English	206
Notice of Cross-Appeal by Yniguez	209
Citation to Decision on the Merits by Ninth Circuit, *en banc*	210
Order Awarding Nominal Damages by the District Court	211
Order Granting Certiorari and adding questions	212

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(Phoenix)

DOCKET

Proceedings include all events.
TERMED
2:88cv1854 Yniguez, et al v. State of Arizona, et al
TERMED

U.S. District Court
U.S. District Court for the District of Arizona (Phoenix)

CIVIL DOCKET FOR CASE #: 88-CV-1854

Yniguez, et al v. State of Arizona, et al
Filed: 11/10/88
Assigned to: Judge Paul G. Rosenblatt
Demand: $0,000 Nature of Suit: 440
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in ◆0 : is :92- -17087
Dkt # in 9CCA : is 90-15581

Cause: 42:1983 Civil Rights Act

11/10/88	1	Civil Rights and Injunctive and Declaratory Relief Complaint Filed. Summons issued. (Sd) [Entry date 11/15/88]
11/22/88	6	Motion by defendant State of Arizona to dismiss for lack of jurisdiction (sd) [Entry date 11/23/88]

12/07/88 15 Motion by plaintiff for preliminary injunction and order to show cause. (Sd) [Entry date 12/08/88]

2/13/89 60 ORDER by Judge Paul G. Rosenblatt granting stipulation (#59), and that this case be advanced & consolidated w/the hrg on pltf's app for prel inj scheduled t/b heard 2/13/89. (cc: all counsel) (sd)

2/23/89 66 SECOND AMENDED COMPLAINT (adding pltf, Jaime P. Gutierrez). (sd) [Entry date 02/24/89]

4/27/89 -- M/E: (C/R Bill McNutt) #68 - motion to dismiss for lack of jurisdiction; #30 - motion to dismiss; #15 - motion for preliminary injunction and order to show cause: All mtns taken under advisement. (Sd) [Entry date 05/03/89]

2/06/90 76 MEMORANDUM AND ORDER: by Judge Paul G. Rosenblatt granting and den in part dfts motion to dismiss for lack of jurisdiction and mtn to dismiss. FO: denying motion for preliminary injunction and order to show cause. [see doc for details] (cc: all counsel) (ce)

2/06/90 77 JUDGMENT: by Judge Paul G. Rosenblatt: article 28 of Const of State of AZ is declared void ... (re: order [76-1] (cc: all counsel/jgmt drawer) (ce)

2/15/90 78 MOTION to intervene filed by Official English

Committee and Robert D. Park [78] (ce) [Entry date 02/16/90]

2/16/90 82 MOTION to amend or alter jgmt by defendant [82-1] (ce) [Entry date 02/21/90]

3/26/90 -- CLERK'S MINUTES Judge Inits: PGR Crt Rptr: B. McNutt denying motion by State of AZ ex rel Robert K. Corbin to intervene by [92] denying motion to amend or alter jgmt by defendant [82-1] denying motion to intervene filed by Official English Committee and Robert D. Park [78] finding the motion to supplement argument moot. (mi)

4/04/90 105 MEMORANDUM AND ORDER: by Judge Paul G. Rosenblatt denying motion to amend or alter jgmt by Corbin [82], denying motion by State of AZ ex rel Robert K. Corbin to intervene [92], denying motion to intervene filed by Official English Committee and Robert D. Park [78]. (cc: all counsel) (ce)

4/09/90 106 NOTICE OF APPEAL by Arizonans for Off., Robert D. Parks from District Court [105], [76] (cc: 9CCA/All Counsel) (TDO - movant). (ce) [Entry date 04/10/90] [Edit date 04/10/90]

4/09/90 109 NOTICE OF APPEAL by State of Arizona, Robert K. Corbin from District Court jgmt on 2/06/90 and frm order dtd 4/04/90 den dft Corbin's mtn to altr amd jgmt and from 4/04/90 order den State of AZ's mtn to intervene. [77-1], [105-1] (cc: 9CCA/All Counsel) (ce) [Entry

date 04/17/90]

4/20/90 112 NOTICE OF APPEAL by Jaime P. Gutierrez from District Court [77-1], [76-1] (cc: 9CCA/All Counsel) (ce) [Entry date 04/25/90]

8/20/91 118 CERTIFIED COPY OF JUDGMENT from 9CCA affirming in part and reversing in part the decision of the District Court re: [Appeal [112-1] [Appeal [106-1] [109-1] 9CCA Nos. 90-15546, 90-15581 (cc: all counsel) (jh)

11/05/92 -- Original Record Received from 9CCA re [112-1] 3 volumes orig file; (dl)

12/3/92 123 NOTICE OF APPEAL by intervenor Arizonans for Off., intervenor Robert D. Parks from District Court [77-1], [76-1] (cc: 9CCA/All Counsel) (dl) [Entry date 12/09/92]

12/15/92 124 NOTICE OF CROSS-APPEAL by pla Maria-Kelly F. Yniguez from District Court [77-1], [76-1] (cc: 9CCA/All Counsel) (dl) [Entry date 12/23/92] (Edit date 12/23/92]

3/16/93 127 ORDER by Judge Paul G. Rosenblatt granting pltfs' re-submitted motion for award of attorney's fees [120-1] is gr to extent that the pltfs are awarded $97,582.50 in attorneys' fees. (cc: all counsel) (ce) [Edit date 10/20/93]

4/08/93 128 NOTICE OF APPEAL by dft State of Arizona, dft Rose Mofford from District court [127-1] (cc: 9CCA/All Counsel) (dl) [Entry date

04/14/93]

11/2/95 130 CERTIFIED COPY OF 9CCA Mandate affirming in part and reversing in part and remanding the decision of the District Court [Appeal [128-1], [Appeal [124-1], and [Appeal [123-1] (cc: all counsel/PGR) (rew)

11/7/95 131 ORDER by Judge Paul G. Rosenblatt re: order on appeal [130-1]; pla Maria-Kelly Yniguez is awarded $1.00 in nominal damages terminating case (cc: all counsel/jdgmt drwr) (rew)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKET

GENERAL DOCKET FOR Ninth Circuit Court of Appeals

Court of Appeals Docket #: 90-15546
File: 4/26/90
Nsuit: 3440 Other civil rights (Fed)
Yniguez, et al v. State of Arizona
Appeal from: District of Arizona (Phoenix)

- - - Case type information:
1) civil
2) private
3)
- - - Lower court information
District: 0970-2 : CV-88-1854-PGR
court reporter: Jean M. Moll
court reporter: Roberta Hightower
court reporter: William A. McNutt
presiding judge: Paul G. Rosenblatt, District Judge
Date Filed: 11/10/88
Date Order/Judgment: 4/03/90
Date NOA Filed: 4/09/90

- -

Fee status: paid

- -

Prior cases:
None
Current cases:

Lead	Member	Start	End
consolidated:			
90-15546	90-15581	4/27/90	

- Panel Assignment:
Panel: TT BBF SR 3 : PAS 12/14/90 pm
Date of decision: **/**/**

- -

Proceedings include all events.
90-15546 Yniguez, et al v. State of Arizona

4/26/90 1 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. Setting schedule as follows: CADS due 5/10/90 for James F. Henderson; appellant's designation of RT is due 4/19/90; appellee's designation of RT is due 4/30/90; appellant shall order transcript by 5/09/90; court reporter shall fine transcript in DC by 6/11/90,,, ; certificate of record shall be filed by 6/18/90 ; appellant's opening brief is due 7/26/90; appellees' brief is due 8/27/90; appellants' reply brief is due 9/10/90; [90-15546] (mt) [90-15546]

5/09/90 7 Filed Appellants Robert D. Parks & Arizonans' motion to expedite appeal. [90-15546, 90-15581] served on 5/07/90 [1760241] (CONFAT) [90-15546, 90-15581] (dg) [90-15546 90-15581]

5/24/90 9 Filed order CONFATT (BLS) Case selected for Pre-Briefing Conference program. A pre-

briefing conference will be held on 6/20/90 at 10:30 a.m. pacific time. The time schedule order remains in effect. [90-15546, 90-15581] (dg) [90-15546 90-15581]

5/30/90 11 Filed order CONFATT (CLB) Appellant's motion for the expedited consideration of its appeal is denied. Subject to reconsideration if any objection filed within 10 days. [1760241-1] [90-15546] (sm) [90-15546]

7/06/90 16 Filed order CONFATT (CLB) These appeals are consolidated. Per the discussions held at the conference, the issues to be raised in these appeals are: a) whether the district court's denial of appellants' post-judgment motions to intervene was proper; b) whether the Arizona appellants, as defendants dismissed from the action on their own motion, retain sufficient interest in the case to permit them to appeal the court's judgment. The briefing schedules previously set by the courts orders of 4/26/90 and 4/27/90 are vacated. The following briefing schedule shall govern these appeals: a) Appellants Arizonans for Official English Committee and Robert D. Park shall file an opening brief of not more than 30 pages on or before 7/26/90. b) Appellants State of Arizona and Robert Corbin shall file an opening brief of not more than 40 pages on or before 7/26/90. c) Appellants shall file a joint excerpts of record on or before 7/26/90. d) Appellees shall file one answering brief of not more than 60 pages on or before 9/11/90. e) Appellants in each of

these appeals may file a reply brief of not more than 15 pages on or before 9/25/90. (4) The clerk shall set these appeals for oral argument as soon as possible. (5) Because appellants in No. 90-15546 agree to the establishment of the briefing schedule outlined above, their motion for reconsideration of the denial of their motion to expedite is moot. Accordingly, appellants Arizonans for Official English agree to the withdrawal of their motion. (6) The clerk shall docket as attorney of record for appellees in both appeals: Robert J. Pohlman, Pohlman & Sanders, 2525 East Arizona Biltmore Circle, Suite 220, Phoenix, AZ 85016, (602) 224-0100. (7) The clerk shall docket as attorney of record for appellants Arizonans for Official English & Robert D. Parks: Barnaby W. Zall, Williams & Jensen, P.C., 1101 Connecticut Avenue, N.W., 5th Floor, Washington, DC 20036, (202) 659-8201. Subject to reconsideration if any objection filed within 10 days., [90-15546, 90-15581] (sm) [90-15546 90-15581]

12/14/90 36 ARGUED AND SUBMITTED TO: TANG, FLETCHER, REINHARDT [90-15546, 90-15581] (jc) [90-15546 90-15581]

7/19/91 40 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. TANG; FLETCHER; REINHARDT, author.) FILED AND

ENTERED JUDGMENT. We shall retain jurisdiction over the appeal of the dc's decision on the merits. [90-15546, 90-15581] (ck) [90-15546 90-15581]

8/05/91 45 Received James F. Henderson for Appellant Robert D. Parks, Appellant Arizonans letter dated 7/31/91 re: clarification of court's intention, re: 7/19/91 opinion (PANEL) [90-15546, 90-15581] (sm) [90-15546 90-15581]

8/14/91 47 MANDATE ISSUED [90-15546, 90-15581] (sm) [90-15546 90-15581]

9/16/91 51 Filed Appellee Maria-Kelly F. Yniguez' document entitled "Suggestion of Mootness", served on 9/12/91 (PANEL) [90-15546, 90-15581] (sm) [90-15546 90-15581]

9/20/91 49 Filed Appellant Robert D. Parks' motion to recall the mandate, served on 9/18/91 [2000490] (AUTHORING JUDGE) [90-15546, 90-15581] (sm) [90-15546 90-15581]

7/13/92 60 RECORD RETURNED. (See control card for details.) (ft) [89-55946 89-56146 89-56214 90-10146 90-15546 90-15581]

9/16/92 62 Filed per curiam opinion (Judges Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): rejecting the state's suggestion of mootness. (Rejecting Park's motion to recall mandate) [2000490-1] [90-15546, 90-15581] (dl) [90-15546 90-15581]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKET

GENERAL DOCKET FOR Ninth Circuit Court of Appeals

Court of Appeals Docket #: 92-17087
Filed: 12/18/92
Nsuit: 3440 Other civil rights (Fed)
Yniguez, et al v. State of AZ, et al
Appeal from: District of Arizona (Phoenix)
- - - Case type information:
1) civil
2) private
3)
-- - Lower court information:
District: 0970-2 : CV-88-01854-PGR
court reporter: Jean M. Moll
court reporter: William A. McNutt
presiding judge: Paul G. Rosenblatt, District Judge
Date Filed: 11/10/88
Date order/judgment: 2/06/90
Date NOA filed: 12/03/92
- - - Fee status: paid
- - - Prior cases:
90-15546 TT BBF SR
Date filed: 4/26/90 Date disposed: 7/19/91
Disposition: af.rv/opn 90-15581 TT BBF R
Date filed: 4/27/90 Date disposed: 7/19/91
Disposition: af.rv/opn
Current cases:
Lead Member Start End
consolidated:

92-17087 93-15719 4/22/93
cross appeal:
92-17087 93-15061 1/15/93

Panel Assignment:
Panel: BBF SR DFO : **/**/**
Date of decision: **/**/**
Panel: SR CHH CEW 1 : SF 7/20/95 am
Date of decision: **/**/**
Panel: TT BBF SR 2 : PAS 5/03/94 pm
Date of decision: **/**/**
Panel: AKJ MDH null 1 : SF 7/20/95 am
Date of decision: **/**/**
Panel: MB AK FFF 1 : SF 7/20/95 am
Date of decision: **/**/**
Panel: JCW PRH HP 1 : SF 7/20/95 am
Date of decision: **/**/**

Docket as of April 4, 1996 6:27 am

Proceedings include all events.
92-17087 Yniguez, et al v. State of AZ, et al

12/18/92 1 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. Setting schedule as follows: CADS due 1/04/93; appellant's designation of RT is due 12/14/92; appellee's designation of RT is due 12/23/92; appellant shall order transcript by 1/04/93; court reporter shall file transcript in DC by 2/02/93; certificate of record shall be filed by 2/09/93; appellant's opening brief is due 3/22/93; appellees' brief is due 4/20/93; appellants' reply brief is due

5/04/93; [92-17087] (wd) [92-17087]

2/08/93 7 Filed Arizonans Against Constitutional Tampering's motion to become amicus curiae, served on 2/05/93 [PROMO] [92-17087, 93-15061] (ot) [92-17087 93-15061]

2/10/93 6 Case released from Pre-Briefing Conference program. (jr) [92-17087 92-17103 92-17108 92-17116 92-17119]

4/12/94 51 Filed order (Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): The Motion For Leave To File An Amicus Curiae Brief, filed by Arizonans Against Constitutional Tampering ("ACCT") is granted. The brief shall be no more than 30 pgs in length, and shall be filed on or before Apr 28, 1994. In addition to filing the regular nbr of copies of its brief with the Clerk of the Court and serving the parties in normal course, amicus ACCT shall arrange for the receipt, on or before the filing date, of a copy of its brief by each member of the panel in his or her respective chambers. (all csl adv) in 92-17087, 93-15061 [92-17087. 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

5/02/94 53 Filed Amicus Arizonans Against Constitutional Tampering's Motion to Participate in Oral Argument, served on 5/02/94 (FAXED/PAS to Lucy, to be distributed to panel) (ot) [92-17087 93-15061 93-15719]

5/03/94 55 ARGUED AND SUBMITTED TO Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT [92-17087, 93-15061, 93-15719] (lu) [92-17087 93-15061 93-15719]

5/26/94 57 Filed Amicus Arizonans Against Constitutional Tampering and Thomas Espinoza's motion to intervene as plaintiffs-aples, served on 5/25/94 [PANEL] (ot) [92-17087 93-15061 93-15719]

6/21/94 64 Filed order (Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): the motion to Intervene as Plaintiffs-Appellees, submitted by ACCT and Thomas Espinoza, as ACCT Chairperson, is granted. [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

12/07/94 72 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Thomas TANG; Betty B. FLETCHER; Stephen R. REINHARDT, author.) FILED AND ENTERED JUDGMENT. [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

12/20/94 73 Filed original and 40 copies Aplts/X-Aples Arizonans For Official English and Robert D. Park's petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 12/19/94 (PANEL & ACTIVE JUDGES) (ot)

[92-17087 93-15061 93-15719]

12/21/94 74 Filed original 03 copies State of AZ motion to modify opinion, served on 12/20/94 (PANEL) [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

12/29/94 80 Filed Appellant/Cross-Aples Arizonans for Official English and Robert D. Park's response, opposing State of Arizona cross-appeal motion to modify the opinion, etc., served 12/28/94 PANEL [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

1/12/95 82 Filed order (Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): The motion for leave to file an amicus curiae brief in support of the P/R & Suggestion for Rehearing En Banc, filed by the U.S. English, is granted. In addition, the parties are directed to file written responses to both Intv-Def/Aplts Arizonans for Official English's P/R & Suggestion For Rhrg En Banc and the amicus brief of U.S. English. The written responses are to be no more than 15 pgs in length and shall be filed w/in 21 days of the date of this order. 40 copies of the written response shall be filed. [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

1/17/95 83 Filed order and amended opinion (Judges Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT, author. Opinion id: [The opinion filed Dec 7, 1994 is amended as

follows: See Casefile for amendments] AFFIRMED IN PART, REVERSED IN PART, AND REMANDED [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

1/23/95 85 Filed order (Thomas TANG, Betty B. FLETCHER, Stephen R. REINHARDT): Interv/Def-Aplts-cross-appeal opposition to State of AZ's motion to modify opinion filed Dec 29, 1994, was not rcv by the pnl until after the order amending the opinion was submitted by the Clk for filing. Accordingly, the Atty Genl is now directed to submit a ltr-brf of not more than 12 pgs responding to the opposition. The ltr-brf shall be filed w/in 21 days of the date of this order ..... response shall address the genl question of Az Atty Genl's and shall be filed with the Clk and served on all csl. Copies shall be mailed to the chambers of the three jdgs whose names appear on this order. (For complete text of order see casefile) [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

1/24/95 86 Received Barnaby W. Zall for Amicus Robert Corbin, Appellant /x-Aple Arizonans letter 1/23/95 re: the petition for rehearing and the suggestion for rehearing en banc submitted on Dec 16, 1994 and if a new P/R shld be filed based on the amd opn, served 1/23/95 PANEL [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

5/12/95 103 Filed order (J. C. WALLACE,): Upon the vote

of a majority of nonrecused regular active judges of this crt, it is ordered that this case be reheard by the en banc crt pursuant to Cir R 35-3. in 93-15719, 92-17087, 93-15719 [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

6/02/95 112 Filed order (NO FOR PUBLICATION) (J. C. WALLACE): Within twenty-one (21) days of the filing of this order, the parties are requested to file simultaneously with this court ..... Each brief shall to the format of Ninth Circuit Court of Appeals and be no more than twenty-five (25) pages in length. (for complete text see casefile) (PHONED at 3:45 pm PT.) [92-17087, 93-15061, 93-15719] (rei) [92-17087 93-15061 93-15719]

7/20/95 145 ARGUED AND SUBMITTED TO J. C. WALLACE, Procter R. HUG, Harry PREGERSON, Stephen R. REINHARDT, Cynthia H. HALL, Charles E. WIGGINS, Melvin BRUNETTI, Alex KOZINSKI, Ferdinand F. FERNANDEZ, Andrew J. KLEINFELD, Michael D. HAWKINS [92-17087, 93-15061, 93-15719] (eu) [92-17087 93-15061 93-15719]

10/5/95 148 FILED OPINION IN TWO VOLUMES: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Heard en banc; J. C. Wallace, concurrence to

dissent; Procter R. Hug; Harry PREGERSON; Stephen R. REINHARDT, author and Special Concurrence; Cynthia H. HALL; Charles E. WIGGINS; Melvin BRUNETTI, concurring; Alex KOZINSKI, dissenting; Ferdinand F. FERNANDEZ, dissenting; Andrew J. KLEINFELD; Michael D. HAWKINS) AND ENTERED JUDGMENT. [92-17087, 93-15061, 93-15719] (ot) [92-17087 93-15061 93-15719]

10/27/95 151 MANDATE ISSUED [92-17087, 93-15061, 93-15719] (jr) [92-17087 93-15061 93-15719]

12/8/95 160 File order (J. C. WALLACE, Harry PREGERSON, Stephen R. REINHARDT, Cynthia H. HALL, Charles E. WIGGINS, Melvin BRUNETTI, Alex KOZINSKI, Ferdinand F. FERNANDEZ, Andrew J. KLEINFELD, Michael D. HAWKINS,): A majority of the en banc court has voted to refer the application of award of atty. fees to the three-judge panel. [92-17087, 93-15061, 93-15719] (em) [92-17087 93-15061 93-15719]

12/27/95 161 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 95-974 filed on 12/21/95. [92-17087, 93-15061] (crw) [92-17087 93-15061]

1/10/96 162 Filed order (Deputy Clerk: CAC/CLERK) In light of the en banc court's referral of the application of award of attorney fees to the three-judge panel, Judge O'Scannlain has been

drawn to replace Judge Tang on the panel. The panel now consists of Judges Fletcher, Reinhardt and O'Scannlain. [92-17087, 93-15719] (vt) [92-17087 93-15719]

3/29/96 164 Received notice from Supreme Court, petition for certiorari GRANTED on 3/25/96. Supreme Court No. 95-974 (ah) [92-17087 93-15061 93-15719]

STATE OF ARIZONA
LOYALTY OATH

I, the undersigned, hereby execute this document in compliance with Chapter 108 (House Bill 115) Laws 1961, First Regular Session.

Sec. 38-231, Arizona Revised Statutes:

38-231. OFFICERS AND EMPLOYEES REQUIRED TO TAKE LOYALTY OATH; FORM: PENALTY

A. In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce Section 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer or employee means any person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or

affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so take and subscribe to the form of oath or affirmation set forth in this section.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, related to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or employee, before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

STATE OF ARIZONA)
) SS #527-92-4228
COUNTY OF Maricopa)

I, Maria Kelly F. Yniguez do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; That I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of Department of Administration according to the best of my ability, so help me God (or, so I do affirm).

Maria-Kelly Yniguez

1988 GENERAL ELECTION PUBLICITY PAMPHLET

ARIZONA
PUBLICITY PAMPHLET

"THE CHOICE IS YOURS"

Propositions to be submitted to the qualified electors of the State of Arizona at the

GENERAL ELECTION
NOVEMBER 8, 1988

COMPILED AND ISSUED BY
JIM SHUMWAY
SECRETARY OF STATE

Filed 7/15/88
4:58 p.m.

TABLE OF CONTENTS

106 An Amendment to the Arizona Constitution by Initiative Petition providing that English be the official language of the State of Arizona 25
Ballot Format 34

[25]

PROPOSITION 106

OFFICIAL TITLE

AN INITIATIVE MEASURE

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA RELATING TO THE ENGLISH LANGUAGE PROVIDING THAT ENGLISH IS THE OFFICIAL

LANGUAGE OF THE STATE OF ARIZONA, AND AMENDING THE CONSTITUTION OF ARIZONA BY ADDING ARTICLE XXVIII.

TEXT OF PROPOSED AMENDMENT

Be it enacted by the People of the State of Arizona.

The following amendment to the Constitution of Arizona, by adding Article XXVIII, is proposed to become valid when approved by a majority of the qualified electors voting thereon and on proclamation of the governor.

Section 1. The Constitution of Arizona is amended by adding Article XXVIII, to read:

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

1. English as the Official Language; Applicability.

Section 1.(1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to:

(i) the legislative, executive and judicial branches of government.

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders,

programs and policies.

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. Requiring This State to Preserve, Protect and Enhance English.

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

3. Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.

Section 3.(1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary

to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

[26]

(c) to teach a student a foreign language as a part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

4. Enforcement; Standing.

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

ANALYSIS BY LEGISLATIVE COUNCIL
(In compliance with A.R.S. section 19-124)

Proposition 106 would amend the Constitution of Arizona by adding article XXVIII to make English the official language of this state and all political subdivisions of this state, including every city and county. The Proposition would require this state and all cities and counties to act in English and no other language. To be valid, all governmental documents would have to be written in the English language only. The Proposition would allow the state and its political subdivisions to act in a language other than English when necessary to comply with federal laws, to teach a student a foreign language, to protect the public health and safety and to

protect the rights of criminal defendants or victims of crime. Proposition 106 also would allow a person who resides or does business in Arizona to enforce this new constitutional requirement in court.

LEGISLATIVE COUNCIL ARGUMENTS FAVORING PROPOSITION 106

The State of Arizona is at a crossroads. It can move toward the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language.

Immigrants from all over the world have been able to share their cultural heritages with other Americans because our citizens have shared a common language. With one shared language we have learned to respect other people and other cultures with sympathy and understanding.

But today, language conflicts and ethnic separatism threaten to erode our common bond. If this erosion continues, it will result in irreparable damage to the fragile unity that our common language has helped us preserve for over two hundred years. This amendment will stop this erosion by requiring this state as well as all cities and counties to function only in English, except where public health, safety and justice require the use of other languages. Our state and local governments would also protect English by issuing voting ballots and materials only in English, except when required to do otherwise by federal law.

This constitutional amendment sends a clear and simple message -- English is the official language of Arizona. To function and participate in our society, every resident must know English. When people are not encouraged to learn English as quickly as possible, they don't have the same opportunities as others who are skilled in English and they are kept out of the mainstream of American politics, society and

economy. English is the language of opportunity, of government and of unity.

LEGISLATIVE COUNCIL ARGUMENTS OPPOSING PROPOSITION 106

This Proposition, despite its title, will not preserve English as our common language. Instead, it will undermine the efforts of new citizens of our state to contribute to and enter the mainstream of American society.

While claiming to be a way of promoting unity, this Proposition will actually foster disunity among our citizens where none now exists. It threatens to divide Arizona and tarnish our proud heritage of unity and tolerance.
[27]

This Proposition is completely unnecessary. English is now and will remain the language of Arizona. Ninety-eight percent of Americans are fluent in English. And the remaining two percent already have economic reasons to learn English that are far more effective than any ballot proposition can ever hope to be.

The promoters of this Proposition have not thought out its consequences. It is not clear what the state or a local government could or could not do. For example, it could outlaw essential multilingual public service information such as pamphlets informing non-English speaking parents how to enroll their children in school. It could also allow the elimination of court interpreters for witnesses, crime victims and defendants. Street signs with foreign names could be outlawed. The uncertain requirements of this Proposition would invite costly, decisive and endless legal battles. And in the end the only winners would be the lawyers.

This Proposition will not help or prompt anyone to learn English. It will not improve human relations. It will not lead to a better state. Instead it will lead to tension and costly

litigation. It is unnecessary, counterproductive and, in the most fundamental sense, un-American.

ARGUMENT "FOR" PROPOSITION 106

Proposition 106, the proposed constitutional amendment to designate English the official language of Arizona requires that government conduct its business in English. "As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions," reads the initiative.

A similar initiative to designate English the official-language was passed in California in 1986. 73 percent voted in favor of that initiative.

Further, besides California, 13 other states have already declared English to be their official language.

Proposition 106 has three basic purposes:

1. Designate English the official language of Arizona;
2. Require the government to function in English, except in certain circumstances; and
3. Require the government to preserve and protect the English language.

Under Proposition 106, government may use languages other than English to:

- Protect the health and safety of citizens,
- Teach foreign languages in schools,
- Protect the rights of crime victims and those accused of committing crimes,
- Comply with federal law, and,
- Teach English to non-English speaking citizens.

Officially sanctioned multilingualism causes tension and division within a state. Proposition 106 will avoid that fate in Arizona, while promoting a more efficient and cost-effective government.

Additionally, passage of Proposition 106 would encourage non-English speakers to familiarize themselves with the language, opening up economic and social opportunities to all Arizonans.

By mandating that government preserve the English language, Proposition 106 ensures that Arizonans will share the common bond of language for generations to come.

The time is now to declare in law what we assume to be fact:

English is our official language

Vote YES on Proposition 106.

Robert D. Park
Chairman,
Arizonans for Official English

[28]

ARGUMENT "FOR" PROPOSITION 106

Proposition 106 is a proposed Constitutional Amendment that would make English the official language of Arizona. If passed, English will become the primary language of government. Our everyday lives will not generally be affected. Various languages will continue to be taught in schools, and language among friends and in the private workplace will not be altered in any way.

Ours is an age when governments and educators in almost every country in the world encourage children to learn English, a language recognized as the language of international business and air travel as well as that of unity and prosperity.

The motto of our nation, "E Pluribus Unum", "Out of Many, One", is the enduring theme and strength of America. Today, due to a trend toward official multilingualism, our great unifying force – the use of the English language – is eroding,

and our nation is becoming a people separated by, instead of unified by, language.

The federal government complies with, even perpetuates this lack of unity by requiring states to print bilingual ballots whose extra costs of 10 to 20 percent are then passed on to all citizens.

In addition, the efforts of misguided leaders to promote multilingualism have hurt the persons they are trying to help by delaying their entry into the economic, political and social mainstream of America.

Fourteen states, including California, have already taken action to reinstate the common bond of language in their citizenry by passing measures making English the official language.

As a voter, you have been given an opportunity to create a characteristic to be shared by all Arizonans – making English the official language. We urge you to utilize this opportunity to promote unity in our nation. Support Proposition 106 by voting YES on November 8.

Carl J. Kunasek
President
Arizona Senate

Dave Carson
Representative
District 1

ARGUMENT "FOR" PROPOSITION 106

The United States is truly a nation of immigrants, who have been drawn to America as a beacon of freedom and opportunity. Because of our diverse background, we share no common bond of race, ethnicity or religion. One bond we do share, however, is the bond of a common language – English.

Throughout our history, immigrants have sought to learn English not only to benefit from the economic opportunities made available as a result of that knowledge, but also to mark their entry into the mainstream of American society.

In recent decades, both the federal and state governments have drifted away from this historic emphasis on English by using other languages for a host of nonessential services. This departure from our historic language policy will have far-reaching effects on the future of American society.

We believe that a policy of a single common language has served our nation well and it avoids the chaos and cost of official multilingualism.

If Arizona voters approve the amendment to make English the official state language they will be signaling the will of the people to maintain our common bond of language and will be directing the state government to halt the drift towards official multilingualism or bilingualism.

Unless we become serious about protecting our heritage as a society of various cultures bound by a common language, we may lose a precious resource that has helped us forge a single people from so many diverse elements. Making English the official language of government will protect the future successful integration of new Americans, as it has helped make Americans out of so many immigrants in the past.

Vote YES on Proposition 106 on November 8.

Linda Chavez
President
U.S. English

[29]

ARGUMENT "FOR" PROPOSITION 106

If the United States is to remain a great nation of which we can all be proud, we must have only one official language. We can enjoy many different traditions, cultures, races and languages. However, we must have only one official language for governmental purposes. Without the unifying force of one official language, divisiveness and conflicts are certain to

develop.

All patriotic citizens in Arizona will be making a significant contribution toward maintaining our country as a leader in the world of nations when they vote YES on Proposition 106 as an amendment to our state Constitution.

When Arizona citizens cast a YES vote on Proposition 106 it will NOT be denying any non-English speaking person the right to have: 1) an interpreter in an election booth, or, 2) an interpreter in any police action or criminal court of law.

Passage of Proposition 106 will not eliminate bilingual ballots in any official state, county or local elections where required by federal law.

Passage of Proposition 106 will in no way eliminate or discourage the study of foreign languages in our schools. Neither will it disallow the use of any language in conversations in homes, churches or among friends in the private workplace.

Passage of Proposition 106 will permit the continued promotion of bilingual education on all levels of learning in our state where required by federal law.

Passage of Proposition 106 will not eliminate bilingual public notices for the health and safety of our citizens.

The main reason for Proposition 106 is to guarantee that official governmental business, including documents drawn at the state level, as well as business and those documents drawn for all political subdivisions such as counties, cities and town, shall be valid, effective and enforceable only if conducted and written in the English language.

W. P. Shofstall, Ph.D.
Professor Emeritus, ASU
Former Superintendent of
Public Instruction, Arizona

Wayne A. Forde, MA in Ed.
Retired Assistant Principal
Phoenix Union High Schools

Lewis A. Tambs, Ph.D.
Professor of History, ASU
Former U.S. Ambassador,
Columbia and Costa Rica

ARGUMENT "AGAINST" PROPOSITION 106

Every foreign born citizen came to America because here, they have freedom of choice. They became American citizens by choice.

I cannot understand how any American citizen would want English to be our official language after knowing that our forefathers won a revolution 200 years ago to rid this country of English rule.

The only reason we are still using English based law is because of the compromise made to the self-serving English Bankers when making the constitution.

People in Australia speak English because they are subjects of England. Americans are not subjects of England, therefore, our official Language should not reflect a country other than AMERICAN.

In almost every country in the world the language reflects the name of their country. Why should America be different?

People in Russia speak Russian, people in Germany speak German, people in Italy speak Italian, people in Japan speak Japanese, people in Spain speak Spanish, people in France speak French, people in Poland speak Polish, people in England speak English and American speak American even if it is derived from English.
[30]

Even the English refer to our language as American shown in the glossary printed in England for use in foreign auto repair books.

American should be designated the official language of the United States of America, just as the Webster dictionary shows on it's cover.

If you feel "American" should be designated our official language you have the right to vote no to English and write in Proposition number 106 and the word AMERICAN in the space provided on your write-in envelope.

Buck Burdette, Pres.
Quartzsite School Board
Quartzsite, Arizona

ARGUMENT "AGAINST" PROPOSITION 106

Arizona has had a long tradition of embracing the Hispanic and Native American cultures. We see those cultural influences in our art and architecture, our food, our festivals and even our language. The names of our mountains and our rivers, our cities and our streets bear testimony to the pervasive influence that the Hispanic and Native American languages have had on our state.

Despite these influences, there has been no attempt to conduct the State's business in other language. The governing language of this state has been, and will continue to be, English. Those from other countries and cultures try to learn English as quickly as possible. Immigrants are flooding our English-language classes. Everyone agrees that proficiency in the English language is essential for personal and financial success in this state. Proposition 106 will not help one person to learn a single word of English.

Proposition 106 does more than simply maintain the status quo, however. The constitutional amendment raises a number of questions. Will lawyers no longer be able to use the Latin phrases "habeas corpus" and "subpoena"? Will deaf people be prevented from having a sign language interpreter

at city council meetings? Will a city employee be prohibited from explaining a water bill charge to someone who speaks only Spanish? The answers to these types of questions will be determined by the courts through expensive taxpayer-financed lawsuits.

Proposition 106 is offensive to Hispanics and Native Americans because it implies that they are not trying hard enough to learn the English language. But it is also offensive to all other Arizonans. We don't need a law that in any way discourages contributions from those cultures that have so enriched our state.

I urge you to vote no on Proposition 106.

Senator Jaime Gutierrez

ARGUMENT "AGAINST" PROPOSITION 106

Arizona is made up of people from many nations, many cultures, many languages. We are proud to have more Native American communities than any other state, that settlers come here from Spain and Mexico, the rest of Europe, Asia and Africa.

The very name of our State, Arizona, comes from another language.

Now, an organization based in Washington, D.C., proposes that we amend the Arizona Constitution to enact an "English-only" proposal.

What terrible problem does this radical action seek to solve? I can think of none. What problems will "English only" cause if adopted? I can think of many.

There is no question but that residents of Arizona should be proficient in English to fully participate in daily life. However, this measure does not create better ways of teaching English or to help improve communication skills. Instead, it makes it a crime for any government official or

employee to conduct business in a language other than English. It also allows any Arizona resident or person doing business in Arizona to file a lawsuit to enforce the language ban. Harassing lawsuits will create an additional financial burden for Arizona taxpayers.
[31]

Other languages can be used only in the few situations involving public "health and safety". The limited exception does not seem to allow a police officer or bus driver to give directions to a non-English speaking tourist. Government agencies cannot conduct business with foreign trade delegations interested in buying Arizona products in their own language.

Today, the success of Arizona's economy and the future prosperity of our children is increasingly dependent upon our ability and willingness to compete in the global market place. If Arizona adopts "English only" it will send a negative message to our potential trade partners. We cannot afford to shrink our economic opportunities.

Terry Goddard
Mayor, City of Phoenix

ARGUMENT "AGAINST" PROPOSITION 106

The English Only movement has arrived in Arizona with the intent of changing our constitution to declare English the official language. It sounds reasonable, but Arizona's teachers have reviewed this proposition carefully and found that there is more here than meets the eye. The English Only movement, financed primarily by out-of-state funds, poses a threat to school children and public education itself.

Practically speaking, English is already the official language of Arizona and the United States. A review of the

English Only movement reveals a national campaign that uses language to discriminate against Americans of diverse ethnic backgrounds. Such reactionary views recall some unfortunate periods in American history: the Jim Crow laws of the 1870's, the Chinese Exclusion Act of 1882, the anti-German, English-only Nebraska Act, which was a repercussion of World War I.

These discriminatory laws were the result of perceived conspiracies. Groundless fear of ethnic conspiracy is exactly what the English Only movement in Arizona represents today.

Two out-of-state organizations are behind this movement and have contributed heavily to the Arizona campaign: English First and U.S. English. The President of English First is an officer of another organization which issued a report that implies that Hispanics are a national security risk. We cannot afford passage of this proposition, repeating previous, reactionary blunders.

Instead, it is time we learned from history. English is not in danger; we can't allow alarmists to spread the fear that it is. Such fear discourages the teaching of other languages at a time when multi-lingual communications skills are critical to our Nation's economic and political success worldwide.

Vote no on English Only.

Darrell Guy, President
Arizona Education Association

ARGUMENT "AGAINST" PROPOSITION 106

Vote no on "English Only" Initiative.

Vote no on the "English Only" initiative if you believe that freedom and justice belongs to all Americans regardless of their language.

Vote no on the "English Only" initiative if you believe that the basic inalienable constitutional rights of life, liberty and the pursuit of happiness belong to all Americans regardless of language.

The "English Only" initiative is veiled in an artificial cloak of patriotism. It is ill intentioned and would discriminate against some of our citizens by restricting basic government services and denying them administrative due process because of language.

Arizona LULAC
Ralph Romero
Director

[32]
ARGUMENT "AGAINST" PROPOSITION 106

We all agree that proficiency in English is important for anyone who wants to play a meaningful role in society. That is why I supported a proposal that would direct the Legislature to create programs to meet the goal of English literacy. However, the initiative to declare an English-only policy in Arizona is sadly misdirected.

Arizona is commercially a multi-lingual state. Each year, Arizona spends millions of dollars to attract visitors from around the world. A newspaper story earlier this year detailed how Arizona was in the top ten destinations for foreign visitors.

In addition, this state has devoted considerable efforts to encourage exports to other countries. These efforts include the establishment of an office in Taiwan.

Proposition 106, if adopted, could preclude our Departments of Commerce and Tourism from publishing brochures in any foreign language. This would put our state at a serious disadvantage with other states and countries

which recognize the importance of helping businessmen and tourists with pamphlets and documents available in other languages.

This proposition could also bar state employees from answering the most routine questions and providing help in many circumstances.

Many Arizonans object to the cost of printing ballots in both Spanish and English. However, Proposition 106 will not eliminate bilingual ballots, which are mandated by federal law.

Passage of an English only amendment would cause more problems for Arizona than it would solve. I strongly urge that you defeat the measure.

Rose Mofford
Governor

ARGUMENT "AGAINST" PROPOSITION 106

Proposition 106 is a lie.

- It is a lie because it plays on the dislike of the bilingual ballots. But the measure would not affect such ballots, which are controlled by federal law.
- It is a lie because it pretends to protect bilingual education programs designed to teach English to youngsters. But that protection dissolves if such programs are no longer mandated by the federal government.
- It is a lie because it pretends to be a home-grown effort. But virtually every dollar to put the measure on the Arizona ballot came from an organization based on the East Coast. And petition circulators had to be paid to work on the project.
- It is a lie because backers say it is just like the one adopted by California voters two years ago. But the

language of the Arizona measure is far broader and has many more prohibitions against the use of other languages.

- And, finally, it is a lie because it pretends that it will cause more people to learn English. Yet it contains absolutely nothing to provide that education.

The key to English proficiency is education for youngsters raised in non-English speaking households and for adults who have never mastered the language. Prohibiting government workers from communicating in any language other than English simply excludes these people from participation in society.

The measure is divisive. It should be relegated to the scrap heap of bad ideas.

State Rep. Armando Ruiz
Chairman, Arizonans Against Constitutional Tampering

[33]

ARGUMENT "AGAINST" PROPOSITION 106

We are a nation of immigrants.

Either we or our ancestors – excluding Native Americans – came from many countries. We all came for different reasons, but every one of us looked upon this nation as a place of freedom and opportunity.

This diversity brought strength to this nation. It brought generosity, kindness and a spirit of tolerance. We accept many new things and we grow with our open minds.

Now, some would have us close our minds.

Proposition 106 is the most restrictive and punitive English only measure to be proposed in any state. It goes far beyond what was enacted in California. It is stricter than a measure that is before Colorado voters this year.

It would result not only in discrimination against

Arizonans but also would encourage litigation against government officials and employees. It would mandate that all government agencies act in English only and that no other language may be used, with only a few exceptions, such as in protecting the rights of criminal defendants or victims of crime.

That means a government official, employee or agent of the state who may violate this provision – no matter what the reason – could be sued by an Arizona resident or anyone doing business in this state.

Creating more litigation is not the answer for Arizona.

I see the efforts to enact English only legislation as efforts to close the door to our tolerance and generosity. I see these efforts as barriers to our ability to change and grow. In short, I see these efforts as a sign of hard-heartedness in this country.

Proposition 106 is a bad idea and should be defeated.

Morris K. Udall, U.S. Representative

ARGUMENT "AGAINST" PROPOSITION 106

Arizonans are very concerned about current proposed amendments regarding the use of language. Primarily, the Official English amendment. We urge public officials and the community at large to oppose any action intended to mandate or declare English as the only language. Such actions are unnecessary, unconstitutional and un-American. English is already the recognized language of Arizona and the Nation. Relatively few people do not speak English.

The Official English amendment would outlaw the use of any language other than English in the conduct of government business. Only English will be allowed in public schools, state universities, city or state government offices.

negotiations with Mexico or South America. All non-criminal legal proceedings would have to be conducted in English only. No translators would be allowed either for witnesses or for the parties involved. Unable to get answers these groups would de facto have no rights.

Another set of potential victims of Official English are government employees. The Arizona version of Official English has a third party suit provision. That means that if someone overhears a language other than English being used by a government employee, that person can bring suit. Any resident or person doing business in Arizona can sue. Anyone who uses a foreign phrase or word even accidentally is in jeopardy!

The Official English amendment does not deal with learning English at all. It merely punishes people who do not speak English. The Official English representatives have refused to give their time or money to the literacy projects that are struggling to handle the huge demand for their services. There are thousands on waiting lists, desperate to learn English.

The amendment will cost money. It is expensive to regulate an area that has never been regulated.

Jesus "Chuy" Higuera
State Senator

[34]

BALLOT FORMAT

PROPOSITION 106
PROPOSED AMENDMENT TO THE CONSTITUTION BY THE INITIATIVE

OFFICIAL TITLE

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA RELATING TO THE ENGLISH LANGUAGE; PROVIDING THAT ENGLISH IS THE OFFICIAL LANGUAGE OF THE STATE OF ARIZONA, AND AMENDING THE CONSTITUTION OF ARIZONA BY ADDING ARTICLE XXVIII.

DESCRIPTIVE TITLE

AMENDING ARIZONA CONSTITUTION MAKING ENGLISH THE OFFICIAL LANGUAGE OF THIS STATE AND ALL POLITICAL SUBDIVISIONS; REQUIRING ALL GOVERNMENTAL ACTIONS, FUNCTIONS AND DOCUMENTS TO BE IN ENGLISH; PROVIDING EXCEPTIONS FOR COMPLIANCE WITH FEDERAL LAW, LANGUAGE INSTRUCTION, PROTECTING PUBLIC HEALTH AND SAFETY AND PROTECTING CRIMINAL DEFENDANTS AND VICTIMS OF CRIMES.

PROPOSITION 106

A "yes" vote shall have the effect of requiring governmental agencies to conduct official business in English with certain exceptions. YES ➜ _____

A "no" vote shall have the effect of maintaining the current language status of conducting the affairs of governmental agencies. NO ➜ _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert J. Pohlman, State Bar No. 004601
Stephen G. Montoya, State Bar No. 011791
BONN & POHLMAN, CHARTERED
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1447-01
Attorneys for the Plaintiff

MARIA-KELLY F. YNIGUEZ,
Plaintiff,

CIV. NO. 88-1854 PHX PGR

vs.

STATE OF ARIZONA, ROSE MOFFORD, individually, and as Governor of the State of Arizona, ROBERT K. CORBIN, individually, and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona,
Defendants.

AFFIDAVIT OF MARIA-KELLY F. YNIGUEZ

* * * * *

4. My use of the Spanish language is a part of my being and cultural heritage as a citizen of the United States of America. I exercise my right to speak and write in the Spanish language under the freedoms guaranteed to me by the First and Fourteenth Amendments to the United States Constitution as one of the personal liberties guaranteed to

citizens of the United States of America.

5. If I were denied the right to communicate in the Spanish language, I would be unable to communicate all of my thoughts, concepts, ideas and emotive feelings to persons who are unable to speak the English language but who are capable of understanding the Spanish language. I would also be deprived of my freedom of association with such persons.

6. When I speak Spanish to a Spanish-speaking listener of Hispanic origin, or otherwise familiar with Hispanic culture, such communication includes not only the meaning of the words alone, but also otherwise inexpressible sentiments of shared community, culture and ethnicity as well as to demonstrate my belief that Arizona enjoys a pluralistic society.

7. I am aware from my personal experience in using the English and Spanish languages that emotions, feelings, concepts and ideas which are clearly expressed in one language may not, and often do not, have any clear equivalent in the other language. My facility with the English and Spanish languages has provided me with a larger vocabulary and means of expression, particularly when speaking to bilingual persons. Without the ability to communicate in both languages, my ability to freely and clearly communicate my ideas, concepts, feelings and emotions is impaired.

* * * * *

12. In the course of acting for the State of Arizona as a State Service employee, and with the knowledge and consent of my supervisors, my actions and functions have included communicating verbally and in writing with those

persons asserting medical malpractice claims against the State of Arizona and their legal counsel to determine the nature of their civil claim, the extent of injuries and damages asserted and the propriety of the civil claim. At the request of my supervisors and co-workers, I also have spoken in the Spanish language with persons who speak only Spanish in connection with other claims against the State of Arizona. Among those types of claims with respect to which I have communicated in Spanish are claims of employment discrimination allegedly practiced by the State against minority employees.

13. While speaking to persons who speak only the Spanish language, I explain the policies and procedures of the State of Arizona relating to the assertion of claims by such persons and discuss the merits and facts of their claims. This activity permits me to collect and disseminate information relating to the Risk Management Division's discharge of its statutory responsibilities to the State and people of Arizona. I have previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern. If I am not permitted to communicate in the Spanish language with persons who speak the Spanish language but not the English language, I will be denied the opportunity to obtain and disseminate information which is of public importance and interest.

14. In the course of acting for the State of Arizona as a State Service employee and discharging my duties to the State and its citizens, I have communicated in both the English and Spanish languages with claimants and their attorneys. I have spoken and/or written in the Spanish language to numerous claimants and attorneys as a natural

and necessary part of my duties.

15. Previously, in the course of acting for the State of Arizona as a State Service employee, I spoke and wrote in the English language to persons who speak only English, in the Spanish language to persons who speak only Spanish, and a combination of the English and Spanish languages to persons who were able to communicate in both the English and Spanish languages. Some of the persons with whom I communicated in a combination of the Spanish and English languages are persons whose English is not sufficiently well-developed to understand all of the English expressions and ideas which I desired or needed to communicate. Some of the persons with whom I communicated in the Spanish language also are capable of communicating in the English language, however, I used the Spanish language for communication because the emotions, concepts, ideas and feelings which I desired to express were, in my judgment and the exercise of my liberties, best and most clearly expressed in the Spanish language.

16. In the course of acting for the State of Arizona as a State Service employee, I frequently used the Spanish language to communicate with bilingual persons as a matter of free choice and as a means of expressing emotions, concepts, feelings, opinions and other expressive ideas to the persons with whom I communicated. As described above in this Affidavit, not all of the communicative uses for which I utilize the Spanish language are susceptible to expression in the English language. Persons to whom I so communicated include other State employees (including other State Service employees), claimants and attorneys representing claimants.

17. In the course of acting for the State of Arizona

as a State Service employee, with the knowledge and consent of my supervisors, I have prepared legal documents in both the English and Spanish languages to ensure that citizens who were unable to understand the English language could understand the legal import of the document they were asked to sign.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial Address Omitted]

[Caption Omitted]

CIV. NO. 88-1854 PHX PGR

PLAINTIFF'S STATEMENT OF FACTS IN SUPPORT OF APPLICATIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

* * * * * *

3. Kelly is a State Service employee employed by the State of Arizona in the Risk Management Division of the Department of Administration. She is the Medical Program Administrator and, among other duties, manages medical malpractice claims asserted against the State of Arizona or physicians for whom the State provides insurance on a self-insurance basis. She has been so employed since 1984. [Yniguez Aff. ¶ 9]

* * * * *

5. Kelly's actions and functions performed during the conduct of her duties as a State Service employee do not include any actions or functions which are designed or intended to:

a. Assist students who are not proficient in the English language or provide educational or foreign language instruction of any kind;

b. Protect the public health or safety; or

c. Protect the rights of criminal defendants or victims of crime. [Yniguez Aff. ¶ 10]

6. In the course of acting for the State of Arizona as a State Service employee, Kelly's functions and actions on behalf of the State of Arizona include communicating with those persons asserting medical malpractice claims against the State of Arizona and their legal counsel to determine the nature of their civil claim, the extent of injuries and damages asserted or suffered and the propriety of the civil claim. [Yniguez Aff. ¶ 12]

7. Kelly is bilingual, fluent and literate in both the Spanish and English languages. Spanish and English are Kelly's two natural languages. Kelly thinks in both languages and, in the course of otherwise unimpeded conversation, naturally alternates between the two languages to appropriately express herself to persons who are able to understand her. She considers the Spanish language to be a part of her cultural heritage. [Yniguez Aff. ¶¶ 2, 3, 4 and 6]

8. In the prior course of acting for the State of Arizona as a State Service employee and discharging her duties to the State, Kelly communicated in both the English and Spanish languages with claimants and their attorneys. She has spoken the Spanish language to claimants and attorneys as a natural and necessary part of acting and functioning on behalf of the State. [Yniguez Aff. ¶ 14]

9. In the prior course of acting for the State of Arizona as a State Service employee, Kelly spoke the English language to persons who speak only English, the Spanish language to persons who speak only Spanish, and a combination of the English and Spanish languages to persons who were able to communicated in both languages. Some of the persons with whom she communicates in a combination of the Spanish and English languages were persons whose

command of the English language was not sufficiently well-developed to understand all of the English language expressions and ideas which Kelly desired to communicate. Some of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly communicated in the Spanish language because the emotive ideas and feelings which she desired to express were, in her judgment and the exercise of her liberties, best and most clearly expressed in the Spanish language. In addition, Kelly communicated in the Spanish language to express otherwise inexpressible concepts and ideas, such as her cultural heritage as a Hispanic, the sense of community and experiences shared by Hispanics and other feelings. [Yniguez Aff. ¶¶ 15 and 16]

10. In the course of acting for the State of Arizona as a State Service employee, Kelly has drafted legal documents in both the English and Spanish languages to enable persons who were unable to understand the English language to comprehend the legal import of the document they were signing. [Yniguez Aff. ¶ 17; Affidavit of Robin L. Perin, ¶ 4, the "Perin Aff."; Affidavit of James Mullen, ¶ 5, the "Mullen Aff."] She also communicated in the Spanish language pertaining to matters of public interest and importance. Kelly has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public and private concern. [Yniguez Aff. ¶ 13]

* * * * *

14. Language is the means by which persons express and communicate their thoughts, ideas and emotions. Any particular language does not express the same ideas and feelings in the same manner or with the same effect as a different language. Many emotive ideas and feelings are

more clearly communicated in one language than another. Feelings and ideas which are clearly expressed in one language may not, and often do not, have any linguistic equivalent in another language. The words which comprise a language express distinct ideas and a person able to speak in more than one language has, in effect, a larger vocabulary and reservoir of expression. [Yniguez Aff. ¶ 7]

* * * * *

35. Kelly, being the only person in the Risk Management Division capable of communicating in Spanish, believes that her ability and freedom to express her ideas and feelings in Spanish are and will be restrained by the Article and, if such ability and freedom were exercised in the manner in which they were freely exercised prior to the adoption of the Article, would subject her to suit by persons residing or doing business in the State of Arizona and/or employment-related sanctions by the Defendants. Due to her concerns, Kelly has ceased to communicate in languages other than English pending a judicial determination of her rights. Her concerns and the degree of her anxiety has been exacerbated by the inconsistent and vacillating positions of the Governor and Attorney General with respect to matters [illegible] Proposition 106 and Article XXVIII. [Yniguez Aff. ¶¶ 11, 20, 21, 22 and 23].

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial Address Omitted]

[Caption Omitted]

CIV. NO. 88-1854 PHX PGR

ANSWERS TO PLAINTIFF'S FIRST SET OF NON-UNIFORM INTERROGATORIES AND REQUESTS FOR ADMISSION

[Definitions and Instructions Omitted]

* * * * * * * * *

REOUEST FOR ADMISSION No. 34: Admit that Maria-Kelly F. Yniguez' use of a language other than English in the course of her performing government business contributes to the efficient operation of the State.

Admit.

REOUEST FOR ADMISSION No. 35: Admit that Maria-Kelly F. Yniquez' use of a language other than English in the course of her performing government business contributes to the efficient administration of the State.

Admit.

REQUEST FOR ADMISSION NO. 36: Admit that the efficient operation of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English.

Admit – if these citizens are not proficient in English-

REOUEST FOR ADMISSION- No. 37: Admit that the efficient administration of the State is enhanced by permitting State service employees to communicate with citizens of the State in languages other than English.

Same answer as No. 36.

REQUEST FOR ADMISSION NO. 38: Admit that language conflicts and ethnic separatism threaten to erode the English language.

Objection, it calls for pure opinion.

REOUEST FOR ADMISSION NO. 39: Admit that the use of languages other than English by citizens of the State of Arizona threatens to erode the English language.

Objection. See No. 38.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial Address Omitted]

MARIA-KELLY F. YNIGUEZ and
JAIME P. GUTIERREZ
Plaintiffs,

CIV. NO. 88-1854 PHX PGR

vs.
ROSE MOFFORD, individually and as Governor of the State of Arizona, ROBERT K. CORBIN, individually and as Attorney General of the State of Arizona, and CATHERINE EDEN, individually, and as Director of the Department of Administration of the State of Arizona,
Defendants.

SECOND AMENDED COMPLAINT
(Civil Rights and Injunctive and Declaratory Relief)

The Plaintiffs for their Second Amended Complaint against the Defendants allege as follows:

JURISDICTION AND VENUE

1. This Complaint arises from the Defendants' actual and threatened infringement of the Plaintiffs' rights under the First and Fourteenth Amendments to the Constitution of the United States. Accordingly, the Plaintiffs bring this action pursuant to 42 U.S.C. § 1983; this Court's jurisdiction rests on 28 U.S.C. §§ 1331, 1343, and 2201.

2. Venue in this action is appropriate in the District

of Arizona pursuant to 28 U.S.C. § 1391 (b).

STATEMENT OF THE CLAIMS

3. Plaintiff Maria-Kelly F. Yniguez is of Hispanic descent and is a citizen of the United States of America who resides in Maricopa County, Arizona. Plaintiff Jaime P. Gutierrez is of Hispanic descent and is a citizen of the United States of America who resides in Pima County, Arizona.

4. The Plaintiffs are each bilingual, fluent and literate in both Spanish and English.

5. Maria-Kelly F. Yniguez has been employed as a State Service employee in the Risk Management Division of the Department of Administration of the State of Arizona since approximately 1984 and is still so employed.

6. Jaime P. Gutierrez is an elected government official, an Arizona State Senator, and is a member of the Arizona State Legislature.

7. Defendant Rose Mofford is the Governor of the State of Arizona. Defendant Robert K. Corbin is the Attorney General of the State of Arizona. Defendant Catherine Eden is the Director of the Department of Administration of the State of Arizona. The individual Defendants are responsible for the administration of the laws of the State of Arizona.

8. As a condition of her employment with the State of Arizona, Maria-Kelly F. Yniguez was required to execute a loyalty oath in which she pledged, inter alia, to "support the Constitution and the laws of the State of Arizona" and to "bear true faith and allegiance to the same."

9. The State of Arizona has adopted specific standards of required conduct for State employees, violation of which "is cause for discipline or dismissal of a State Service employee." Among the required standards of conduct is the obligation that State employees "[c]omply with State Laws and Rules." (A.C.R.R. R2-5-501)

10. As a condition to his receiving compensation as a State Senator by the State of Arizona, Jaime P. Gutierrez was required to execute a loyalty oath in which he pledged, inter alia, to "support the Constitution and the laws of the State of Arizona" and to "bear true faith and allegiance to the same" as required by A.R.S. § 38-231. As a member of the State Legislature, Jaime P. Gutierrez has a duty to uphold the laws of the State of Arizona, including its Constitution.

11. The Constitution and laws of the State of Arizona provide, inter alia, for the impeachment of elected State officials for "high crimes, misdemeanors or malfeasance in office." (Ariz. Const. art. VIII.)

12. As part of her official duties as an employee of the State of Arizona, Maria-Kelly F. Yniguez communicates with those persons asserting medical malpractice claims against the State of Arizona. In that regard, she communicates in Spanish with claimants who are fluent in Spanish but who are unable to speak and understand English and with claimants who speak and understand English but elect to communicate in Spanish.

13. Moreover, prior to November 8, 1988, Maria-Kelly F. Yniguez often spoke in Spanish to Spanish speaking co-workers while conducting official State business. Thus, Maria-Kelly F. Yniguez had exercised the right and privilege of discharging her employment duties in her two natural languages before November 8, 1988.

14. As a part of his official duties in conducting government business in and for the State of Arizona, Jaime P. Gutierrez communicates with State employees and officials, citizens of the State of Arizona and others. In that regard, he communicates in Spanish with persons who are fluent in Spanish but who are unable to speak and understand English and with persons who speak and understand English but elect to communicate in Spanish.

15. On or around November 8, 1988, a majority of the citizens of the State of Arizona voting in a general election approved an initiative measure to amend the Arizona Constitution by adding Article XXVIII to the Arizona Constitution.

16. Article XXVIII declares English to be the "Official Language" of the State of Arizona and mandates that, inter alia, "the English language is the language of the ballot, the public schools and all government functions and actions" and that the "State and all political subdivisions of this State shall act in English and in no other language." (Emphasis added.) Article XXVIII binds "all government officials and employees during the performance of government business." (Emphasis added.) Thus, Article XXVIII requires all State employees and elected officials to act exclusively in English while performing government business.

17. Article XXVIII further provides that any "person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection." (Emphasis added.) Article XXVIII, however, neither specifies nor limits remedies available or authorizes legislation to do so.

18. Defendants Mofford, Corbin and Eden are responsible for implementing and enforcing Article XXVIII.

19. Because Article XXVIII prohibits State employees from using languages other than English "during the performance of government business" and a condition of Maria-Kelly F. Yniguez's employment with the State of Arizona is that she abide by the Arizona Constitution, her employment is subject to termination or other sanctions if she speaks Spanish while conducting official State business.

20. Because Article XXVIII prohibits State officials from using languages other than English "during the

performance of government business," Article XXVIII interferes with Jaime P. Gutierrez's rights to communicate freely with persons who speak languages other than English, including persons from his Senate district.

21. Furthermore, because Article XXVIII grants standing to any person residing or doing business in Arizona to enforce Article XXVIII, Maria-Kelly F. Yniguez and Jaime P. Gutierrez are also in danger of incurring not only liability for using Spanish in the course of their employment and performance of government business, but exposure to a multiplicity of lawsuits and to remedies of an unknown nature.

22. The First and Fourteenth Amendments to the Constitution of the United States guarantee the rights of Maria-Kelly F. Yniguez and Jaime P. Gutierrez to use Spanish in the course of their employment and performance of government business.

23. Because Article XXVIII subjects the Plaintiffs to employment discharge or other sanctions, the threat of lawsuits, and/or other liability for using Spanish during the performance of government business, the Plaintiffs are fearful of exercising their rights under the First and Fourteenth Amendments to the United States Constitution and have consequently refrained from fully exercising those rights since the passage of Article XXVIII. The Plaintiffs' fearful forbearance from fully exercising their First and Fourteenth Amendment rights constitutes irreparable injury warranting injunctive relief.

24. Similarly, because Article XXVIII subjects the Plaintiffs to employment discharge or other sanctions, the threat of lawsuits, and/or liability for using Spanish during the performance of government business, Article XXVIII violates the Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

25. Additionally, since Article XXVIII intentionally

discriminates against Plaintiffs based upon their ancestral origin without legitimate State interest, Article XXVIII violates their rights under the Fourteenth Amendment to the United States Constitution.

26. Lastly, upon information and belief, the Plaintiffs' compliance with Article XXVIII violates 42 U.S.C. § 2000d and subjects the Plaintiffs to personal liability therefor.

DEMAND FOR JUDGMENT

WHEREFORE, the Plaintiffs pray for judgment against the Defendants jointly and severally as follows:

A. For an injunction, both interim and permanent, restraining the Defendants, their political subdivisions, departments, agencies, organizations, instrumentalities, officers, employees and agents from implementing, enforcing or threatening to enforce Article XXVIII;

B. For a declaration that Article XXVIII violates the First and Fourteenth Amendments to the United States Constitution and is therefore null and void;

C. For a declaration that compliance with Article XXVIII violates 42 U.S.C. § 2000d;

D. For an award of their attorneys' fees and costs; and

E. For all other relief that the Court deems just and proper under the circumstances.

RESPECTFULLY SUBMITTED this 17th day of January, 1989.

BONN & POHLMAN, CHARTERED
Robert J. Pohlman
Stephen G. Montoya
805 North Second Street
Phoenix, Arizona 85004
Attorneys for the Plaintiffs

ARIZONA ATTORNEY GENERAL
OPINION I89-009

Attorney General
1275 West Washington
PHOENIX, ARIZONA 85007
ROBERT K. CORBIN

January 24, 1989

The Honorable Robert B. Usdane
President of the Senate
State Capitol - Senate Wing
Phoenix, Arizona 85007

RE: I89-009 (R88-136)

Dear Senator Usdane:

We have been asked a number of general and specific questions concerning the constitutionality and effect of Proposition 106 on the delivery of governmental services and on some governmental activities. We conclude that Proposition 106, which adds to the Arizona Constitution article XXVIII, entitled English as the Official Language, is constitutional and will not greatly change the way government operates presently.

It is our duty to give Proposition 106 a construction that is compatible with the United States Constitution and federal laws. See Ariz. Const. Art. II, § 3 ("The Constitution of the United States is the supreme law of the land."); State v. Ramos, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982); Schecter v. Killingsworth, 93 Ariz. 273, 282, 380 P.2d 136, 142 (1963). We must also interpret this amendment to the Constitution as a whole and in harmony with the other portions of the Arizona Constitution. State ex rel. Nelson v. Jordan, 104 Ariz. 193, 196, 450 P.2d 383, 386 (1969); State ex rel. Jones v. Lockhart,

76 Ariz. 390, 398, 265 P.2d 447, 453 (1953). Guided by these principles, we conclude that the language of Proposition 106 does not prohibit the use of a language other than English to facilitate the delivery of governmental services. Additionally, Proposition 106 specifies in subsection 3(2)(b) that the "State may act in a language other than English . . . to comply with other federal laws."

Consequently, we do not conclude that Proposition 106 requires a diminution or unreasonable restriction of services or the placing of barriers to access to governmental processes for non-English speakers, because such an interpretation is not required by the text of the amendment itself and could be inconsistent with applicable federal law and the Arizona and United States Constitutions.

Turning now to the language of the Proposition itself, it suggests that the purpose of the amendment is to require that official acts of government be expressed in English as the state's official language. It does not prohibit the use of other languages when they are reasonably required in the day-to-day operation of government.

Proposition 106 contains four sections. Section 1 states that "The English language is the official language of the State of Arizona," and goes on to provide that "As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions." (Emphasis added.) The remainder of section 1 makes clear that this status of English as the official language applies to all branches and levels of government, to all official documents, and to all officials and employees.

Section 2 provides that "This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona." Neither section 1 nor section 2 contain any language prohibiting the use of any language other than English.

Section 3 does, however, contain terms which prohibit governmental acts in a language other than English. After providing for certain exceptions, subsection 3(a) states: "This State and all political subdivisions of this State shall act in English and in no other language." (Emphasis added.) Subsection 3(b) prohibits governmental entities from requiring the use of a language other than English, and 3(c) states that governmental documents must be in English to be valid and enforceable. The exceptions to the requirement that governmental entities act in English are (in accurate paraphrase): (a) to assist in English-as-a-second-language instruction; (b) to comply with federal laws; (c) to teach a foreign language; (d) to protect public health or safety; and (e) to protect the rights of criminal defendants or victims of crime.

Section 4 provides for a private cause of action to enforce the article.

Most of the concerns raised in the opinion request involve the use of a language other than English in the delivery of governmental services. Therefore subsection 3(1)(a), which contains the words "shall act in English and in no other language," is the applicable subsection that will be primarily discussed. (Emphasis added.)

If use of a language other than English is reasonably

needed to provide governmental services fairly and effectively without adversely impacting an ethnic/linguistic group, the use of that language by the deliverer of governmental services is required by federal laws. The federal laws most closely relevant are Titles VI and VII of the Civil Rights Act of 1964, as interpreted by their implementing regulations and by the courts.[1]

> Section 601 of Title VI provides:
>
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, defines "program or activity" very broadly as

> a department, agency or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency . . . to which the assistance is extended . . . ; or . . . a public system of higher education; or a local educational agency . . . or other school system . . .

If an entity receives no federal financial assistance, its duty to

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[1] Title VI: 42 U.S.C. § 2000d to 2000d-7; Title VII: 42 U.S.C. § 2000e to 2000e-17; for a survey of the Title VI implementing regulations, see Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 618-621 (1983). For the discussion of Title VII interpretations, see infra pp. 7, 9.

provide services (if fairness and effectiveness so require) in a language other than English is, as discussed infra at pp. 6-8, nonetheless not precluded by Proposition 106. We reach this conclusion because of our interpretation that the English-only requirement applies only to official acts of government, and not to every act of every government official or employee. Further, a contrary conclusion would raise serious questions under the equal protection clauses of the United States and Arizona Constitutions.

The Honorable Robert B. Usdane
January 24, 1989
Page 4

If a governmental entity is covered by Title VI and appropriate regulations, proof of intentional discrimination (including discrimination based on ethnicity) is not necessary to prove a violation of this federal law. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582 (1983). All that is needed is a showing that the entity applies a rule, even if fair on its face, which has an adverse impact on an ethnic minority, and is not justified by a business necessity.[2]

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[2] This result follows from the language and construction of Title VI and its implementing regulations. At least forty federal agencies have adopted regulations implementing Title VI and applying the disparate impact standard. See Guardians, 463 U.S. at 619, and nn. 6-7. Funding provided by these agencies affects a very broad range of governmental services. See also Alexander v. Choate, 469 U.S. 287 (1985) (state policy having disparate impact on handicapped persons would be prohibited by regulations implementing section 504 of the Rehabilitation Act of 1973 if "meaningful access" to

Linguistic groups are ethnic groups, and non-English speakers in Arizona and the United States meed the criteria of ethnic minorities.[3] If the words in subsection 3(1)(a), "act in English and in no other language" were to be construed to mean that needed governmental services could not be delivered in a language other than English no matter what the needs of fairness and effectiveness, there would be an adverse impact on non-English speakers. Such a construction would result in a violation of federal law. Moreover, the practice of delivery of services in a language other than English (where reasonably needed) would be an exception provided for by subsection 3(2)(b).[4]

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benefits not provided; Title VI regulations referred to as providing guidance for standard).

[3] See, e.g., Yu Cong. Eng. v. Trinidad, 271 U.S. 500 (1926) (Phillipine law prohibiting keeping of account books in any language other than English, Spanish or a local dialect violates equal protection and due process rights of Chinese, in spite of defense that law was needed to facilitate tax collection); Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibition of teaching children in any language other than English which was directed at persons of German descent violates due process clause); Bartels v. Iowa, 262 U.S. 404 (1923) ("Official English" statute directed at persons of German descent violates due process).

[4] See generally, Note 4, "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States," 100 Harv. L. Rev. 1345 (1987). See also Lau v. Nichols, 414 U.S. 563 (1974). In Lau, the Court noted that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." 414 U.S. at 566. For the application of

The Honorable Robert B. Usdane
January 24, 1989
Page 5

Thus, if the words of section 3(1)(a), "This State . . . shall act in English and in no other language" were to be construed to mean "shall deliver services in English and in no other language," the subsection 3(2)(b) exception (compliance with federal laws), would almost entirely swallow up the rule. Examining the language of Proposition 106, in context, we do not believe this was what was intended. Although Proposition 106 does not define "act," section 1 gives some guidance, providing, in pertinent part, as follows:

> (2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.
> (3)(a) This Article applies to:
> (i) the legislative, executive and judicial branches of government.
> (ii) all political subdivisions, departments, agencies, organizations, and

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the disparate impact standard (as opposed to requiring proof of intentional discrimination) to "English-only" rules in an employment context, see, Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031 (9th Cir. 1988); 29 C.F.R. § 1606.7(b)-(c) (1987); E.E.O.C. Decision 83-7, 31 F.E.P. 1861 (1983). See also Civil Rights Division of the Arizona Department of Law v. Amphitheater Unified School District, 140 Ariz. 83, 680 P.2d 517 (App. 1983) (recognizing disparate impact analysis appropriate to establish a violation of the Arizona Civil Rights Act, and establishing "business necessity" as the proper standard of defense).

instrumentalities of this State, including local governments and municipalities.

(iii) all statutes, ordinances, rules, orders, programs and policies.

(iv) all government officials and employees during the performance of government business.

(Emphasis added.) Because of the broad introductory language of subsection 1(2), clearly

stating that English shall be used for ballots, public schools, and "all government functions and actions," we do not perceive subsection 1(3)(a)(iii) to be an exclusive list, but rather examples of the types of official acts that are contemplated to be covered by Proposition 106.[5] We also look to the dictionary for a common meaning of the word "act". The most clearly applicable common meaning of "act" used as a noun is "a decision or determination of a sovereign, a legislative council, or a court of justice." Webster's International Dictionary 20 (3d ed., unabridged, 1976).

We therefore construe "act" in this context to mean an official act of the government.

Such a construction may also be necessary to avoid

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[5] Enumeration of a list of items in a constitution generally expresses the intent to exclude items not included in the list. Whitney v. Bolin, 85 Ariz. 44, 47, 330 P.2d 1003, 1005 (1958). However, this principle will not be applied to contradict the apparent intent of a provision. Forsythe v. Paschall, 34 Ariz. 380, 383, 271 P. 865, 866 (1928).

conflict with the equal protection clauses of the fourteenth amendment to the federal constitution and article II, section 13 of the Arizona Constitution.[6] Classifications based on ethnicity will be closely scrutinized, and will violate the equal protection clause unless the government can justify them by establishing a compelling interest. Hernandez v. Texas, 347 U.S. 475 (1954); Graham v. Richardson, 403 U.S. 365 (1971) (alienage). Classifications based on language are not in themselves considered, for equal protection purposes, to be invidiously discriminatory classifications based on ethnicity. Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975); Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973). Where an intent to discriminate on the basis of ethnicity can be shown as a purpose of the language classification, however, an intent to discriminate invidiously may

be inferred. Gutierrez v. Municipal Court of Southeast Judicial

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[6] Article II, section 13 provides:

No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

"The equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect." Valley National Bank of Phoenix v. Glover, 62 Ariz. 538, 544, 159 P.2d 292, 299 (1945).

District, 838 F.2d 1031, 1039 and n.6 (9th Cir. 1988) (approving the reasoning of Olagues v. Russoniello, 797 F.2d 1511, 1520-21 (9th Cir. 1986) (en banc), vacated as moot, __ U.S.___, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987) (language a proxy for intentional discrimination on basis of ethnicity where ethnic group thus identified carries a history of mistreatment, political exclusion, and historically long-term use of language identified with ethnicity)). Discrimination based on linguistic characteristics has also been directly held to constitute intentional ethnic discrimination in an employment law (Title VII) context. Carino v. University of Oklahoma Board of Regents, 750 F.2d 815 (10th Cir. 1984); Berke v. Ohio Department of Public Welfare, 30 F.E.P. 387 (S.D. Ohio 1978), aff'd, 628 F.2d 980 (6th Cir. 1980) (per curiam).

Intentional discrimination has been inferred where actions by the majority were seen to give governmental effect to private biases. See, e.g., Palmore v. Sidoti, 466 U.S. 429 (1984). Intent has been inferred at least three times by the United States Supreme Court where voters approved popular referendum measures which, although facially fair, had the effect of overturning legislative enactments which legitimately served the needs of minorities. In Reitman v. Mulkey, the California legislature had prohibited racial discrimination in housing. By the passage of Proposition 63, the voters amended the state constitution to overturn and prevent the reenactment of those laws. The Court voided the Proposition as violative of the equal protection clause because it gave effect to private biases in attempting to take away protections already given to minorities. 387 U.S. 369 (1967). The Court followed the same principle in voiding "voter approval" and "voter initiative" measures which purported to reverse antidiscrimination laws enacted by a legislative body. Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School District No. 1, 458 U.S.

457 (1982).[7]

We do not interpret Proposition 106 as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers. If this were required, the Proposition could be found to give governmental effect to private biases by taking away protections legitimately offered to those entitled to them, and thus would be voided as a violation, not only of Title VI, but also of the federal and state

The Honorable Robert B. Usdane
January 24, 1989
Page 8

equal protection clauses.[8]

To avoid possible conflicts with the federal and state constitutions and federal laws, we therefore conclude that Proposition 106 cannot interfere with the fair and effective delivery of governmental services in languages other than English, or otherwise affect governmental operations so as to unreasonably disadvantage non-English speakers.

Consistent with this conclusion, we reiterate that the provision of Section 3(1)(a), "This state and all political subdivisions of this state shall act in English and in no other language," means that official acts of government as government shall be in English as the State's official language.

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[7] See also Plyler v. Doe, 457 U.S. 202, 219 (1982) (creation of ethnic "underclass" by excluding minor children of undocumented resident aliens present within the United States from public school system violates equal protection clause).

[8] See also cases cited in n.3, supra.

It does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government. With these general conclusions in mind, we are now able to answer the specific questions presented to us.

We have been asked if any restrictions on the use of a language other than English need to be made in any of the following situations:

a. The interaction of state lottery officials with non-English speaking persons . . . either as employees or agents, or as lottery contestants?

A requirement that an employee speak only English on the job, or a requirement that all employees be able to speak English would be a violation of Title VII of the Civil Rights Act of 1964 unless those requirements are bona fide occupational qualifications reasonably necessary to the operation of governmental business. Gutierrez v. Municipal Court of Southeast Judicial District, 838 F.2d 1031 (9th Cir. 1988). A state "Official English" law cannot be used to establish a bona fide occupational qualification. Id. at 1044. The ability to speak English could be a bona fide occupational qualification for an employee if regular contact with the English-speaking public is part of the job requirements, or if an employee would be required, for instance, to interpret official English documents or transmit directions delivered in English. If it is not "reasonably necessary" for all employees of the state lottery to be English proficient in order to perform certain jobs for the lottery, it would be permissible for supervisors to communicate with employees who do not speak English in, or through, another language. Lottery contestants who do not speak English may be communicated within a language other than English in the day-to-day delivery of

services, on the general principles discussed above.

b. The printing of motor vehicle division pamphlets or oral explanation of licensing procedures to applicants for driver and vehicle licensing in languages other than English?

The provision of non-English assistance, whether written or oral, is permissible, and is required if it is necessary to reasonably provide fair and effective services. The nature and extent of the requirement depends on what is both reasonable and necessary for the purpose. See, e.g., Lau v. Nichols, 414 U.S. 563 (1974). What is required also depends on whether or not there are any applicable federal regulations. Moreover, the exemption set out in subsection 3(2)(d) permits use of a language other than English "to protect public health or safety."

c. The naming or designation of highways, streets, bridges, or towns in languages other than English?

The name itself is not an act of government, as we have interpreted the word "act." We perceive a distinction between the use of a word for purposes of identification and the use of language for the purpose of communication of ideas. Further, we recognize that words from other languages historically have been and continue to be absorbed into and become a part of the English language. What Proposition 106 requires is that the governmental acts which create and perpetuate the name be articulated in English. It does not prohibit the use of a non-English name as a street name.

d. The handling of customer inquiries or complaints involving state or local government services, such as ADOT relocation services, child support enforcement, or city water

billings, in languages other than English. Is general communication between elected officials and all other governmental employees with the public at large permissible in other than . . . English?

All official documents that are governmental acts must be in English, but translation services and accommodating communications are permissible, and may be required if reasonably necessary to the fair and effective delivery of services, or required by specific federal regulation. Communications between elected and other governmental employees with the public at large may be in a language other than English on the same principles.

In addition, an elected official may have a federal first amendment right to communicate with constituents in the language of choice. See Garrison v. State of Louisiana, 379 U.S. 64 (1964) (elected official has first amendment protection for statements made in the conduct of his office); Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980) (first amendment right of expression includes right to communicate by most effective means).

e. Discussing professional or business licensing requirements, or accepting license applications, in languages other than English?

Discussions may be in a language other than English, and interpretation services may be provided, but the official application acted upon and the official license issued must be in English.

f. Providing information on state parks services or

programs in languages other than English?

On the same principles, such translations, and direct provision of services in languages other than English are permissible. Since the state parks provide services to visitors from around the world, this question represents a good example of why "shall act" in the Proposition must mean "shall act officially as the government" and not "shall provide services." Moreover, the exemption of subsection 3(2)(d) would permit use of a language other than English if deemed necessary for health and safety reasons in the discretion of those responsible for the parks.

g. Providing information on services or programs offered at common schools or universities in languages other than English?

Again, providing such services and information is permissible and may be required. In particular, educational institutions subject to Title VI should refer to the federal regulations applicable to their agency.

h. The practice of the Governor, employees of the Commerce Department, and other state or local officials or employees visiting with non-English speaking foreign government officials or business representatives of foreign corporations to conduct trade missions and related promotional activities on behalf of Arizona?

Such discussions are permissible, as are translations of any official documents which may result, but the official documents as they are to be acted upon by governments in Arizona must be in English.

i. [W]ith respect to each of the above questions . . . would the answers given change if the non-English speaking persons involved are native Americans?

Our answers would be not be different because the persons involved are native Americans.

In summary, we conclude that Proposition 106 requires official acts of government to be in English. It does not prohibit the use of languages other than English that are reasonably necessary to facilitate the day-to-day operation of government. Proposition 106, therefore, is constitutional, under both the Arizona and United States Constitutions, and compatible with applicable federal law.

Sincerely,

BOB CORBIN
Attorney General

BC:HAS:bl

cc: Senator Peter Kay

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FEBRUARY 13, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MARIA KELLY F. YNIGUEZ,
Plaintiff,

vs.

STATE OF ARIZONA, et al.,
Defendants.

Case No. CIV 99-1854 PHX-PGR
Phoenix, Arizona
Monday, February 13, 1989

Plaintiff's Motion for Preliminary Injunction
and Order to Show Cause.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

APPEARANCES:
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* * * * *

Jaime Gutierrez - Direct

[21]
BY MR. POHLMAN:

Q Senator Gutierrez, as an elected official of the State of Arizona, do you use the Spanish language?

A Your Honor, Mr. Pohlman, yes, I do, depending on the situation, and depending, again, on my judgment if that person who may or may not be a constituent needs the help of a person who speaks a language other than English.

Q Have you, sir, used the Spanish language in speaking to your constituents?

A Your Honor, yes, I have.

Q And do you do so, in your mind, in your capacity as a state senator?

A Your Honor, Mr. Pohlman, yes, I do. I believe that is part of my job, and that is part of my responsibility to the folks who have voted me in, and to the folks who rely on services of government for much of their everyday life.

Q How often, Senator, would you say you use the Spanish language with your constituents?

A Your Honor, Mr. Pohlman, my guess would be anywhere from two to five times on a weekly basis. It depends, many times, on what types of problems come in and who's calling up.

Q Senator Gutierrez, have you stopped using the Spanish language with your constituents since the promulgation

of
[22]
Article 28?

A Your Honor, Mr. Pohlman, no, I have not.

Q And why is that, sir?

A There is, Your Honor, Mr. Pohlman, a duty on my part tomake sure that folks aren't denied either educational material regarding state government, that they're not denied entry or access into state government for resolution of whatever types of problems one may have. It's important that folks who do not have the -- who have not mastered the English language, that it's important that they not be denied those things that folks who are very fluent in English have and are able to participate in government at the state level.

Q Do you fear enforcement of Article 28?

A Your Honor, Mr. Pohlman, I do a little bit. I've been in the Legislature now for 10 years. I was involved in a proceeding against a public official earlier – or rather, last year. I've been sued twice as a member of the Legislature performing what I thought were my constitutional rights and prerogatives as a member of that Legislature. So yes, I do fear that one of these days I will be the subject of a lawsuit under the basis of Article 28.

* * * * *

Jane Hill - Direct

[43]
BY MR. POHLMAN:

Q Dr. Hill, would you describe yourself as a linguistic anthropologist?

A Yes.

Q And could you tell the Court what that is?

A Well, since language is the fundamental way in which

human beings run their affairs and understand their world, the study of language is very important in anthropology, and so some of us specialize in it, and we call ourselves linguistic anthropologists.

Q Is that -- is it fair to say that's a study of language in culture?

A Yes.

Q In the course of your studies as a linguistic anthropologist, have you been involved with the study of language functions at all?

A. Yes, sir.

Q. And could you explain what the language functions are?

A. Yes. Well, most people, I find when I teach, believe that language is for one thing, that is it's to convey

[44]

information from someone who knows something to someone who doesn't know that thing. But in fact, we can identify many functions of language, including the representation of emotions, the manipulation of social contexts to achieve dominance or subordination to another person, the representation of aesthetic reaction, the representation of personal identity, and many different theories of languag[illegible]nction have been proposed, but that's the gist of it.

Q As a cultural -- excuse me, a linguistic anthropologist, do you have an opinion as to whether restricting the use of the language impacts at all on the language functions of a bilingual person?

A. Yes, profoundly.

Q. And could you explain how that occurs?

A. Well, in the study of bilingualism, which is a very important sub-topic in socio-linguistics, the major theory argues this, and that is that mono-lingual people

will use their single language in a variety of functions, and so there will be several ways of speaking. For instance, as an English speaker, I have a number of ways of speaking, depending on who I'm talking to. Among bilinguals, those ways of speaking are likely to be split between the two languages, so that if you tell a bilingual that they can't use one of their languages, this contracts their linguistic repertoire. It makes it impos-

[45]

sible for them to achieve the full range of expression that a mono-lingual would have available to them.

Q They would not, then have the ability to as fully communicate as they previously did?

A That's correct.

Q Doctor, with respect to a language for a -- is language considered an immutable trait?

A. In most contexts, yes.

Q. And why is that?

A. Well, one of the reasons is that people find it very difficult to learn second languages, and particularly to achieve a native speaker's sound to a new language after quite a young age. The estimate of what that age might be varies from as early as one year, to as late as mid-adolescence.

Q Doctor, as a result of your studies have you become acquainted with the importance of Spanish language to Spanish speakers in Arizona?

A. Yes.

Q. And how is that?

A. Well, in socio-linguistics, the study of bilingualism is a central area, and because the Spanish speakers of the American Southwest were probably the biggest community accessible to linguistic scholars, a good deal of basic research, the sort of thing you find in

introductory

[46]

textbooks, has to do with Spanish speakers in the Southwest and Arizona, and so that's how I became acquainted with that literature.

Q. And what conclusions were reached with regard to the Spanish speakers in Arizona?

A Well, all of the authorities conclude that the use of the Spanish language is an important marker of ethnic identity among Spanish speakers in Arizona. The literature describes Arizona Hispanics as a bilingual community, although it's constantly replenished with people from Mexico who may be less fluent in English. The literature describes Arizona Spanish speakers as a community which exhibits what's sometimes called multiglossia, and this is the point that I mentioned earlier about the division of Spanish and English across the several functions. Specifically that Arizona Spanish speakers will tend to use English on more formal occasions. They'll use English with English speakers. They are more likely to use Spanish with other Spanish speakers, and particularly when the context is informal, or when the context requires an emphasis on solidarity, common interest and that sort of thing.

Q Doctor, do you have an opinion as to the effect in Arizona of the use of English only in the government?

A Well, see, Article 28 hasn't been in effect for very

[47]

long. Clearly, it's difficult to see exactly what its effect is going to be. The passage of the amendment I believe was personally quite devastating to Spanish speakers who took it as a personal affront to their patriotism and Americanism.

Q Do you have an opinion, Doctor, as a linguistic

anthropologist as to whether the English only statute will have a disparate impact on any minorities?

A Well, clearly, in the Arizona context, the major impact is going to be on Spanish speakers, and on speakers of Native American languages.

MR. POHLMAN:

I have no further questions, Your Honor.

THE COURT:

You may cross examine.

Jane Hill - Cross

BY MR. CHING:

Q Professor Hill, have you read Article 28?

A Yes, I have.

Q Okay. Does Article 28 affect the use of say Spanish or any other language by a person in his home?

A No, sir, I don't believe it does.

Q Does it affect the use of another language, other than English, in the schools?

* * * * *

[48]

A I believe that it excludes bilingual education and the teaching of languages in colleges and universities.

Q Does it affect the teaching at private schools, and the teaching of say, German in the private schools?

A I don't believe it says anything about private schools, sir, no.

* * * * *

[53]

Maria-Kelly Yniguez - Direct

* * * * *

BY MR. POHLMAN:

Q. As the -- in the medical malpractice field in which you now function, what are your job duties?

A. I am charged with the responsibility to, whenever a claim is brought against the state, to have it investigated, to evaluate the claim and to make some determination as to how it should be handled. If it falls within my authority limit, I make the determination, and that's it.
Q. And what limit of authority do you have?
A. $10,000.
Q. In that limit of authority, what can you do in order to process claims for the state?
A. I can make a determination, I can determine to settle [54] a claim, I can determine to deny a claim. If I choose to settle a claim, I draw up the documentation so that that can take place.
Q. What form does that documentation take?
A. It would be a release, settlement release.
Q. Settlement agreement and release?
A. Right.
Q. Do you draft those documents on behalf of the state?
A. Yes.
Q. And are those documents reviewed by anyone after you have drafted them?
A. No.
Q. Have you ever drafted any of those documents in the Spanish language?
A. Yes, I have.
Q. And how would that come about that you would do that?
A. I do that in instances where the claimant is a Spanish speaker -- excuse me, a Spanish speaker only, or who does not have the facility with the English language, and therefore would not be informed as to what the agreement was. He would not be able to read it in English, and therefore, so that they can understand the

import of the document they are signing, I do draw them up in Spanish.
Q. All right. Do you also draw them up in English at the same time? [55]
A. At times, yes.
Q. Were there times when that did not occur?
A. Yes.
Q. When the only documentation was in Spanish?
A. Correct.
Q. Have you also had occasion to notify claimants that their claims have been denied by the State?
A. Yes.
Q. Have you ever done that in Spanish?
A. Yes, I have.
Q. And have you done that in writing?
A. I've done it in writing, I speak into them -- even if I convey that to them over the telephone, it still is followed up in writing.
Q. Up to the amount of authority you have, the $10,000, then, is it your understanding you have the capacity to bind the State of Arizona?
A. Yes.
Q. And make final determinations on its behalf?
A. Yes.
Q. Kelly, did you have occasion to sign a loyalty oath upon the hiring of you by the State of Arizona?
A. Yes.
Q. And you have indicated that previously you used the Spanish language in connection with your job? [56]
A. Yes.

* * * * * *

[57]
BY MR. POHLMAN:
Q. Is there any reason why you used Spanish as opposed

to English with those people?

A. Yes. Speaking Spanish with someone who I know speaks Spanish and English, we kind of fall back and forth between the two languages. It's kind of a solidarity thing. It's a comfortableness.

* * * * * *

Q. What have you been told about Proposition 106 at the work place, the Risk Management Division? [58]

A. Shortly after the election, there was a staff meeting in which we were told by the Assistant Director, for the time being -- or what he said was, for now, everything is business as usual.

Q. Since then, what have you been told?

A. I have not been told anything. Since the promulgation, we have not been told anything.

Q. Have you personally taken any action as a result of Proposition 106?

A. Yes. I don't speak Spanish in the work place.

Q. And why is that?

A. I don't speak Spanish in the performance of my job.

Q. And why is that?

A. Because I fear that I would be -- it would be contrary to the amendment. I fear that someone could bring a lawsuit against me.

* * * * *

Maria-Kelly Yniguez - Cross

[68]

BY MR. CHING:

Q. In other words, you have your document called a release of claim form, and it is entirely in Spanish?

A. Correct.

Q. And it is signed by the claimant?

A. Correct.

Q. And it is filed in the file?

A. Correct.

Q. Okay. And there's no English counterpart to that document?

A. Not in that file, no.

* * * * * *

[69]

BY MR. CHING:

Q. Okay. The release of claim form, do you draft a separate one every time, or is that something that's done in the word processor, or mimeograph forms, or printed forms?

A. Basically I draw one up specific to that particular claim. A lot of -- if you -- I'm sure you're aware of releases, and a lot of them contain similar language over and over again. But I make it specific to that particular claimant.

* * * * *

[71]

BY MR. CHING:

Q. Okay. So if I were to get hold of these two files, I would see the decision by you written in English, a release of claim form which is only in Spanish, and the TC-50 form, is that correct?

A. Correct.

Q. Okay. And if I were to tell you that I cannot read Spanish, I would have some difficulty in looking at the release of claim form?

A. Correct. I would provide you a translation of it.

Q. You mean, if I asked you?

A. Correct.

Q. But in the file itself, if I was just to order the file, and I look at the relief of claim form, it's entirely in Spanish, it would create some difficulty for a person looking at the file?

A. It probably would.
Q. Okay. Is Fred Cuthbertson your immediate supervisor?
A. Yes, he is.
Q. Okay. So do you know whether he reads Spanish? [72]
A. No, he does not.
Q. So if he were to look at the file, he would understand the decision, he would understand the TC-50 form, but he would not know whether or not the release of claim form is drawn up properly?
A. He would be able to look at the claim forms that we generally use in our division, because it includes the exact same thing as those printed forms that we use in our division.
Q. Yeah. But he would not know.
A. That's correct.
Q. I mean he would assume that this claim form is verbatim some other claim form in English but he wouldn't know.
A. That's correct.
Q. And I wouldn't know.
A. Unless you read Spanish.
Q. And if the Governor would look at it, assuming that she does not read Spanish, she wouldn't know?
A. That's correct.
Q. And if members of the JRVC were to look at it, if they don't have a Spanish speaking person, they would not know?
A. That's correct.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

REPORTER'S TRANSCRIPT OF PROCEEDINGS
APRIL 27, 1989

MARIA-KELLY F. YNIGUEZ, et al.,)
Plaintiff,)
)
vs.)
)
STATE OF ARIZONA, et al.,)
Defendant.)
_____)

No. CIV-88-1854-PHX-PGR
Phoenix, Arizona
April 27, 1989
9:33 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
DEFENDANTS' MOTION TO DISMISS

APPEARANCES:
For the Plaintiffs:
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By: ANTHONY B. CHING, Esq.
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* * * * *

[10]

Maria-Kelly Yniguez -Cross

BY MR. CHING:

Q. Okay. If the court were to issue an injunction which you have requested, you would go back to communicating in Spanish with Spanish-speaking claimants at risk management and also you would go back to drawing up claim release forms in Spanish for those claimants?

A. I believe I would, yes.

Q. Is that why you filed a lawsuit?

A. Yes, it is.

* * * * *

[11]

BY MR. CHING:

Q. So you are alleging in this lawsuit that you have a First Amendment right, that constitutional right, and that's directly from your complaint, to communicate with Spanish-speaking claimants in Spanish, and to draw up claim release forms in Spanish for those Spanish-speaking claimants?

A. Correct.

* * * * *

[14]

MR. POHLMAN:

Your Honor, I'm sorry I confused Mr. Ching, and I don't mean to confuse him or the Court. I don't think

we went outside the stipulation.
I simply wanted to explain that -- that there was no written determination that is in the file with regard to claims other than the releases themselves, because I thought that was unclear from the prior record. And there is an instance which is agreed to in the stipulation where the only release that is signed by the claimants is in Spanish.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Decision on the Merits.
Entered February 6, 1990
730 F.Supp. 309 (D.C. Ariz. 1990)
Reprinted in Appendix to Petition for Certiorari
Beginning at page 97a.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARIA-KELLY YNIGUEZ and)
JAIME P. GUTIERREZ,)
Plaintiffs,)
vs.)
ROSE MOFFORD, individually and as)
Governor of the State of Arizona,)
ROBERT K. CORBIN, individually and)
as Attorney General of the State)
of Arizona, and as Director of)
individually and as Director of)
the Department of Administration)
of the State of Arizona,)
Defendants.)

No. CIV 88-1854 PHX PGR
JUDGMENT

The issues in this matter having been tried before the court, Honorable Paul G. Rosenblatt, District Judge, presiding, and a decision having been duly rendered that plaintiff Yniguez is entitled to declaratory relief for the reasons stated in the memorandum opinion and order made and entered this date,

IT IS ORDERED AND ADJUDGED that Article XXVIII of the Constitution of the State of Arizona is declared void as being violative of the Constitution of the United States.

Dated this 6th day of February, 1990.

Paul G. Rosenblatt
U. S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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MARIA-KELLY F. YNIGUEZ)
and JAIME P. GUTIERREZ,)
Plaintiffs,) No. CIV 88-1854 PHX PGR
v.)
THE STATE OF ARIZONA)
Defendants.)

MOTION TO INTERVENE

The Arizonans for Official English Committee and Robert D. Park, individually and as chairman of Arizonans for Official English Committee, move the Court for an order permitting them to intervene in the above-captioned action on the grounds and for the reason they have interests in the subject matter of this action, which interests are unprotected as more specifically set forth in the Memorandum of Points and Authorities and Appendices, including the Affidavit of Robert D. Park (Appendix B) which are made a part hereof by reference.

This motion is made under the provisions of Rule 24,

Federal Rules of Civil Procedure.
[2]

Attached hereto as Appendix E is Notice of Appeal these movants will file on receiving permission of the Court to intervene.

Respectfully submitted this 15th day of February, 1990.

GUST, ROSENFELD & HENDERSON
By: James F. Henderson
Attorneys for Arizonans for Official English Committee and Robert D. Park

MEMORANDUM OF POINTS AND AUTHORITIES

This action involves a federal constitutional challenge to Article XXVIII of the Arizona Constitution, "English as the Official Language."[1] This Court, in a Memorandum Opinion dated February 6, 1990, declared Article XXVIII to be "void as being invalid on its face in violation of the First Amendment. ..." In the same opinion, this Court dismissed all defendants save Governor Mofford, who has subsequently publicly announced that she intends not to appeal. See Appendices hereto.

Applicants herein, Arizonans for Official English and Robert D. Park, having a strong and legally protectable interest in the outcome of this issue, seek to intervene pursuant to Fed.R.Civ.P. 24(a) for the purpose of taking an appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

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[1]The text of Article XXVIII is attached hereto as Appendix A.

[3]

ARGUMENT

I. Applicants Are Entitled to Intervene Pursuant to Fed. R. Civ. P. 24(a)

Fed. R. Civ. P. 24(a) provides for "intervention of right" as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by other parties.

Applicants here seek intervention under 24(a)(2), based on their interests in the continued vitality of Article XXVIII and the Governor's stated intention not to defend the constitutionality of the article.

Applicants will demonstrate that they meet all elements required to confer a right to intervene under Rule 24(a)(2): first, Applicants possess interests in the subject of the action; second, in the absence of intervention, Applicants will be prevented from protecting their interests; third, Applicants' interests will not be adequately protected by a party; and fourth, Applicants' motion for intervention is timely. Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983).

[4]

A. Applicants Have Interests in the Subject of the Action.

Applicants are a non-profit committee supported by

9,769 citizens of the state of Arizona and an individual who voted in favor of the Amendment. Applicant Arizonans for Official English Committee ("Committee") acted on behalf of those citizens and the public at large in its participation in the events leading to the adoption of Article XXVIII. Applicant Committee was formed for the purpose of promoting adoption of English as the official language of Arizona and has labored in excess of thirteen months and devoted substantial resources to see its efforts to fruition. As the proponent of Article XXVIII, Applicant Committee has a legally protectable interest in the Amendment sufficient to support intervention pursuant to Rule 24(a)(2) in an action challenging the legality of the provision. Washington State Building & Construction Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982), cert. denied, 461 U.S. 913, 103 S. Ct. 1891 (1983); Sagebush Rebellion, 713 F.2d at 527. See also, Meyer v. Grant, 486 U.S. 414, 108 *S.* Ct. 1886 (1988) and Washington, et al. v. Seattle School District No. 1, et al., 458 U.S. 457, 102 S. Ct. 3187 (1982).

Applicant Robert D. Park ("Park") has an equally legally protectable interest in the Amendment to support intervention pursuant to said Rule in that his vote has been cancelled by the decision of this Court.

[5]

B. Applicants' Ability to Protect Their Interests Will be Impaired By Disposition of the Action in the Absence of Intervention.

The impairment to Applicants' ability to protect their interests in the absence of intervention is self-evident. The voiding of Article XXVIII will render the substantial labors and contributions of the Applicant Committees' many supporters, Applicant Park's vote and some 580,829 other ballots for naught. More importantly, if intervention is denied, this result

will occur without the benefit of the full examination provided by the appeal procedure available in the judicial system and without providing those with the greatest interest and investment in Article XXVIII the opportunity to be heard in its defense. Such a result would contravene the law of this circuit and fundamental principles of fairness. Sagebrush Rebellion, 713 F.2d at 527-28; Washington State Building and Construction Trades Council, 684 F.2d at 630; Pellegrino v. Nesbit, 203 F.2d 463, 465-66 (9th Cir. 1953).

C. Applicants' Interests Will Not be Adequately Protected by a Party.

Prior to this Court's decision, Applicants' interests were adequately protected by the Arizona Attorney General. The Attorney General, however, has been dismissed from the action on Eleventh Amendment grounds, an argument pressed by the Attorney General as an alternative to his defense of Article XXVIII on the merits. Under these circumstances, the Attorney General has no right of appeal of this Court's decision on the merits. The only [6] party with such a right of appeal has announced that she will not take an appeal, publicly stating that she is "happy" with the ruling and that she believed Article XXVIII to be "flawed from the beginning." See "U.S. judge throws out 'English' law," The Arizona Republic, February 7, 1990, at pages A-1, A-10, and "Say Adios to official-language laws," U.S.A. TODAY, February 12, 1990, at page 10-A. Appendices C and D hereto. The Governor is thus refusing to defend a duly-enacted provision of the Arizona Constitution on the basis of her personal opinions concerning the provision.

It is beyond question that the Governor, the only remaining party-defendant, is not adequately representing Applicants' interests. In fact, the Governor is acting on interests which are diametrically opposed to those of these

Applicants. Where a party declines to appeal an adverse decision or consents to a settlement under similar circumstances, the party cannot be held to adequately represent the interest of a proposed intervenor with an interest in the subject of the action and intervention is appropriate. Pellegrino, 203 F.2d at 465, citing, Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir.), cert. denied, 323 U.S. 777, 65 S. Ct. 190 (1944).

In this instance, a duly-adopted provision of the Arizona Constitution is in jeopardy with no state official both able and willing to advocate its legality. Applicants respectfully submit that intervention by Applicants is the sole way in [7] which the legality of Article XXVIII will be defended and in which Applicants' interests will be protected.

D. Applicants' Motion to Intervene is Timely.

Timeliness of a motion to intervene is measured from the point in time at which it becomes clear that intervention is necessary. United Airlines, Inc. v. McDonald, 432 U.S. 385, 395, 97 S. Ct. 2464, 2470 (1977). In this case, that point was reached when it became clear that Applicants' interests would no longer be protected by a party-defendant. Prior to the dismissal of the Attorney General from this action, Applicants had neither the need nor the right to intervene. Applicants' interests were actively protected during the course of proceedings in this Court. Only upon the dismissal of the Attorney General from the suit did the spectre of inadequate representation arise - a spectre which quickly became fact with the Governor's public abandonment of the defense of Article XXVIII.

Intervention after judgment is appropriate and must be granted where the Applicants meet the criteria of Fed. R. Civ.

P. 24(a) and act promptly after the entry of judgment to move to intervene. United Airlines, 432 U.S. at 394-396, 97 S. Ct. at 2469-2471; Pellegrino, 203 F.2d at 465-466; Legal Aid Society v. Brennan, 608 F.2d 1319, 1328 (9th Cir. 1979), cert. denied, 447 U.S. 921, 100 S. Ct. 3010 (1980); United States v. American Telephone and Telegraph Co., 642 F.2d 1285, 1294-1295 (D.C. Cir. 1980). Applicants here meet those criteria and urge the Court to [8] grant the motion to intervene pursuant to Fed. R. Civ. P. 24(a)(2).

II. Alternatively, the Court Should Grant Intervention Pursuant to Fed. R. Civ. P. 24(b)

Applicants maintain that they are entitled to intervene pursuant to Rule 24(a)(2) because they have interests in the subject of the action which they will otherwise be unable to protect, which interests will be wholly unrepresented by the remaining party-defendant and because Applicants have promptly sought intervention after the dismissal of the Attorney General. However, assuming arguendo that this Court holds to the contrary, Applicants urge the Court to exercise its discretion to grant intervention pursuant to Fed. R. Civ. P. 24(b)(2).

Unlike an action between purely private parties, this action concerns a matter of importance to the entire citizenry of the State of Arizona, both substantively and procedurally. Over one million citizens of the State of Arizona examined their consciences and expressed their opinions on the desirability of the proposition which became Article XXVIII by casting their votes. The majority of those persons who voted for enactment clearly have a strong interest in seeing that Article XXVIII is not rendered lifeless without full examination on appeal of the State and Federal Constitutional concerns. However, Applicants maintain that every voter and every citizen of the

State of Arizona has an interest in seeing that any duly-enacted provision of the State Constitution is fully and vigorously defended through all [9] appeal levels when its legality is challenged. Applicants submit that any duly-enacted State Constitutional provision invalidated by a trial court should have the benefit of appellate review. The citizenry of the State, having elevated a concept to Constitutional status, deserves no less. Unless the Court grants Applicants' motion for intervention in this case, the citizens' interest in preservation of their Constitutional provisions will be subordinated to the personal convictions of the Governor.

Moreover, the particular issues at stake in this action are of broad-reaching regional and even national interest. Such issues should be given the opportunity for appellate review if only to minimize the occurrence of conflicting precedents. Applicants believe that the Court's decision in this case may conflict with prior precedents concerning English language use requirements and urge the Court to allow intervention so that apparent conflicts may be addressed by the appellate court. See, Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987) (business-related English-only rule of private employer held enforceable); Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); Vasquez v. McAllen Bag & Supply, 660 F.2d 686 (5th Cir. 1981)(absent discriminatory intent, English-on-the-job rule not discriminatory against truck driver who speaks only Spanish).

In addition, as the Court's opinion recognizes, the "substantial overbreadth" doctrine is complex and not easily reduced to an exact definition. Since this doctrine has spawned [10] many disputes, Massachusetts v. Oakes, U.S. 1 109 S. Ct. 2633, 2637 (1989); New York v. Ferber, 458 U.S. 747, 767-74, 102 S. Ct. 3348, 3360-63 (1982); Parker v. Levy, 417 U.S. 733,

760, 94 S. Ct. 2547, 2563 (1974); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 580-81, 93 S. Ct. 2880, 2897-98 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct'. 2908 (1973), the proponents of the initiative should have the opportunity to assert their own interpretation in the appellate court.

Because of the importance of the issues involved, and for the reasons expressed in Applicants' argument in support of intervention as of right, Applicants urge the Court to find these circumstances to warrant intervention pursuant to Fed. R. Civ. P. 24(b)(2) in the event that the Court holds that Applicants are not entitled to intervene pursuant to Fed. R. Civ. P. 24(a)(2).

CONCLUSION

For the foregoing reasons, Applicants respectfully request that the Court grant Applicants' Motion to Intervene After Judgment.

Respectfully submitted this 15th day of February, 1990.

GUST, ROSENFELD & HENDERSON
By: James F. Henderson
Attorneys for Arizonans for Official English Committee and Robert D. Park

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial Address Omitted]

[Caption Omitted]

CIV. NO. 88-1854 PHX PGR

PLAINTIFF'S RESPONSE TO MOTION TO INTERVENE OF ARIZONANS FOR OFFICIAL ENGLISH COMMITTEE AND ROBERT D. PARK

Plaintiff Maria-Kelly F. Yniguez responds hereby to the Motion to Intervene filed by Arizonans for Official English Committee and Robert D. Park and respectfully urges this Court to enter its Order denying that Motion because it is untimely, unnecessary and unwarranted.
[2]

This Response is supported by the Court's file herein and the following Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 2nd day of March, 1990.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

This action was commenced on November 10, 1988 by Maria-Kelly F. Yniguez seeking, among other things, declaratory relief concerning the controversial "Official English" amendment to the Constitution of the State of Arizona. The positions of Governor Mofford and her administration with respect to the amendment and this action

were the subject of extensive publicity, both before and after the trial herein. See, e.g. Exhibits to Plaintiffs' Statement of Facts in Support of Application for Temporary Restraining order and Preliminary Injunction filed December 7, 1988; Plaintiffs' and Defendants' Statement of Stipulated Facts filed February 9, 1989 (paragraphs 38 and 39); Appendices to Motion to Intervene filed February 15, 1990. Nearly sixteen months has elapsed since the case was commenced. Discovery has closed, a trial on the merits has been [3] conducted and a judgment entered. Nevertheless, at this late date the proposed intervenors seek to shun the still unimpaired private right of action granted to them in the Official English amendment and belatedly inject themselves into these proceedings for the purpose of "taking an appeal." The requested intervention should be denied because the intervenors lack standing to prosecute an appeal and because their request is both untimely and unnecessary.

I. THE APPLICANTS ARE NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT

The Ninth Circuit has enumerated a four part standard by which motions to intervene as a matter of right are tested:

> A four part test has been adopted by this circuit to determine whether applications for intervention as a matter of right pursuant to Rule 24(a)(2) should be granted:
>
> > An order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the

> > disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (1986). See also, United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986); United States v. $129,374 in U.S. Currency, 769 F.2d 583 (9th Cir. 1985); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983); County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980). Proper analysis of each of these factors mandates rejection of the requested intervention.

[4]

A. The Motion to Intervene is Untimely

The yardstick for gauging timeliness was also set forth in County of Orange v. Air California, supra:

> In determining timeliness, three factors are weighed: (1) The stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. United States v. State of Oregon, 745 F.2d 550, 552 (9th Cir. 1984). Mere lapse of time alone is not determinative.

799 F.2d at 537. Whether intervention is sought permissively or as a matter or right, the determination as to the timeliness of an application for intervention is a matter left to the trial court's sound discretion. NAACP v. New York, 513 U.S. 345, 366, 93 S.Ct. 2591, 2602, 37 L.Ed.2d 648 (1973):

> Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Ruth 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first

> be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review. (Footnotes omitted)

Here, the applicants ignore the fact that the parties litigant have engaged in discovery and full trial proceedings -proceedings which did not subject applicants or their members to cross-examination, discovery proceedings or any of the other burdens of litigation. This non-participation by the applicants in the discovery and trial process necessarily denied Ms. Yniguez the opportunity to adduce evidence from the applicants. Such evidence might well have provided additional factual support for [5] Ms. Yniguez' alternative claim based upon denial of equal protection. Hence, the applicants' delay in seeking intervention prejudices Ms. Yniguez even beyond the considerable delay and expense to which she would be subjected by an otherwise nonexistent appeal.

Moreover, it is not until after a final judgment has been entered that applicants seek to intervene. The applicants suggest that, up until the announcement of that judgment, their interests were being adequately represented by the original parties. Indeed, it was not until after the judgment was entered that the applicants determined that the end result was not entirely to their liking. A similar argument was rejected by the Ninth Circuit in County of Orange, supra:

> [Applicant] argues that it did not intervene sooner because it did not know until August 20, 1985, the date it learned of the proposed Stipulated Judgment, that its interests were not

> being adequately represented by the original parties. In other words, this was allegedly the first time that [applicant] realized that the end result of the protracted litigation would not be entirely to its liking. In Alaniz, the crux of the appellant's argument was that they did not know the settlement decree would be to their detriment. We held that, surely, they should have known the risks of waiting. Alaniz, 572 F.2d at 659. "To protect their interests, appellants should have joined the negotiations before the suit was settled." Id. In the case at bar, [applicant] should have realized that the litigation might be resolved by negotiated settlement. The local newspapers reported the ongoing negotiations between the parties.
>
> * * * *
>
> In order to protect itself against this eventuality, [applicant] should have intervened sooner. The district court did not abuse its discretion in denying, because it was untimely, [applicant's] Motion to Intervene.

799 F.2d at 538. Similarly, the applicants here should have realized that this litigation might be resolved by an adverse [6] judgment including dismissal of the attorney general as a party defendant. As was the case in County of Orange, supra, the newspapers reported the progress of the ongoing litigation. As in County of Orange, supra, the applicants here should have known the risks of waiting and should have intervened sooner to protect themselves against the eventuality they now believe to be prejudicial. As in County of Orange, supra, this Court should find the Motion to Intervene to be untimely.

B. The Applicants Have No Legally Protected Interest in

the Proceedings Sufficient to Sustain Jurisdiction On Appeal

The "interest" asserted by the applicants in the subject of this action is simply that they were and are proponents of Article XXVIII, Constitution of the State of Arizona -- no more and no less. But, no matter how interested and desirous applicants may be to urge the validity of that amendment, their desire does not equate to a legal entitlement to appeal this Court's Judgment. See Diamond v. Charles, 476 U.S. 54, 90 L.Ed.2d 48, 106 S.Ct. 1697 (1986). In Diamond, a physician who had intervened as a party in interest in the district court sought to appeal to the United States Supreme Court the district court's determination (affirmed by the Seventh Circuit Court of Appeals) that portions of the Illinois Abortion Law of 1975 were unconstitutional. The State of Illinois chose not to appeal those determinations, despite the fact that its own statute was at stake. The Supreme Court refused to grant standing to the physician proponent of the statute holding:

> Because a private party whose own conduct is neither implicated nor threatened by a criminal statute has no judicially cognizable interest in the statute's defense, we dismiss the appeal for want of jurisdiction.

[7]

476 U.S. at 56. Relying on the "case or controversy" requirement of Article III of the Constitution, the Court noted:

> The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art III's requirements. This court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party.

* * * *

> The decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." (citation omitted] It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."

476 U.S. at 62. Thus, simply demonstrating an interest in the outcome of litigation is insufficient to confer a right to appeal. Rather, an appellant must be able to show both an interest and a direct stake in the outcome of the litigation. Here, the applicants have no such direct stake. All they have is an abstract desire that the amendment as written be obeyed. See Diamond, supra (concurring opinion of Justice O'Connor) 476 U.S. at 75-76. In the absence of the original defendants, the applicants are unable to demonstrate any standing that would permit them to appeal the judgment entered herein. Under the circumstances, they have no legally protectable interests in the amendment to support intervention for purposes of appeal. Diamond v. Charles, supra.

C. The Applicants' Right to Enforce the Amendment in State Court Remains Unimpaired

Perhaps the most significant deficiency in the Applicants' Motion to Intervene is their inability to demonstrate that their interests will be impaired as a result of this Court's [8] Judgment. Article XXVIII of the Constitution of the State of Arizona expressly provides citizens an unfettered right to enforce its terms through a private right of action:

> 4. Enforcement, Standing.
>
> Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State.

As a consequence, the applicants may commence their own independent private enforcement action at any time they believe the amendment is being violated. Their right to commence such independent actions has not been abrogated by this Court's Judgment. Indeed, in its Memorandum Opinion and Order herein, this Court expressly recognized that its interpretation is not binding on state courts:

> Given this interpretation of the Article, an interpretation obviously not binding on state authorities; id.; Webster v. Reproductive Health Services, __ U.S. __ , 109 S.Ct. 3040, 3060 (1989)(O'Connor, J., concurring), the court concludes that there is a realistic danger of, and a substantial potential for, the unconstitutional application of Article XXVIII.

Memorandum Opinion and Order filed February 6, 1990, page 12, lines 3-8. The independent right granted to applicants in Article XXVIII itself remains unimpaired. This Court's determination, binding as between the parties hereto, does not eviscerate the applicants' ability to invoke the remedies provided in Section 4. Under the circumstances, applicants have suffered no impairment or impediment to their ability to protect their legal interests. Consequently, they fail to satisfy the third prong of the test governing intervention as a matter of right.

[9]

D. The Applicants' Interests Are Identical to Defendants and Are Adequately Represented

Finally, the applicants contend that their interests are not now being adequately represented by Governor Mofford. According to the applicants, this sudden inadequacy has arisen because Governor Mofford may decline to appeal. While the applicants may not agree with that decision (should it be made), nevertheless, their disagreement does not transform Governor

Mofford's position into one of inadequate representation.

Adequate representation is normally presumed where a litigant representative is a governmental officer charged by law with such representation. Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3rd Cir.) ("... a presumption of adequate representation generally arises when the representative is a government body or officer charged by law with representing the interests of the absentee.") cert. denied, 426 U.S. 921 (1976). In Rizzo, supra, intervention was denied to an applicant who contended that the representation afforded by the governmental authorities was inadequate because it resulted in a settlement. The court rejected that contention noting that any case -- even one being vigorously defended -- may culminate in a consent decree:

> That [intervenors] would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the [defendants] did not adequately represent their interests in the litigation.

530 F.2d at 505. Certainly, if adequate representation may culminate in a consent decree, representation of the interests here at issue is rendered no less adequate by a considered [10] decision not to appeal the final determination of the trial court. As conceded by the applicants, the governmental representatives in the case at bar vigorously defended and adequately represented their interests throughout the trial of this matter. Indeed, because the legal interests of the State and the applicants are identical, this Court can presume that the interests of the applicants are adequately represented. Chiles v. Thornburgh, 865 F.2d 1197, 1215 (llth Cir. 1989) (" ... where [the] interest of [a] proposed intervenor is the same as that of one of the parties, court can presume that the interest is adequately represented."). See also, Athens Lumber Co. Inc. v.. Federal Election Commission, 690 F.2d 1364 (11th Cir. 1982).

Based on the foregoing, the applicants have not carried their burden of proving that their interests are not adequately represented by Governor Mofford.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DENY PERMISSIVE INTERVENTION

In Chiles v. Thornburgh, supra, the Eleventh Circuit Court of Appeals described the standards applicable to a party seeking permissive intervention:

> A party seeking to intervene under Rule 24(b)(2) must show that: (1) his application to intervene is timely; and (2) his claim or defense and the main action have a question of law or fact in common. The district court has the discretion to deny intervention even if both of those requirements are met, and its decision is reviewed for an abuse of discretion. Sellers v. United States, 709 F.2d 1469, 1471 (llth Cir. 1983).

865 F.2d at 1213. The applicants either knew or reasonably should have known of their interest in this case long ago. Rather than seek intervention at an early stage -- when full discovery would have been available and hence no prejudice would [11] inure to the litigants -- the applicants chose instead to permit the case to proceed through trial and final judgment before asserting their interests. Under the circumstances, their request for permissive intervention is not timely. County of Orange v. Air California, supra.

Although the applicants claim that the question of the constitutionality of Article XXVIII is a common legal question justifying intervention, the fact remains that the applicants have alternative avenues they are legally entitled to pursue to adjudicate this question. Ms. Yniguez has fully litigated and

obtained the relief she sought against her employer. She should not now be subjected to an appeal by an outside party that has neither need nor right to interfere in this dispute. Under the circumstances, this Court should exercise its discretion to deny permissive intervention.

Conclusion

The applicants' Motion to Intervene is untimely and prejudicial. The applicants have no standing to pursue an appeal because they have no direct stake in the outcome of this litigation. Moreover, the legal interests of the applicants are fully protected by their unimpaired right to pursue private causes of action granted by Article XXVIII. The representation provided by the State has been concededly adequate. Based on the foregoing, this Court is respectfully urged to enter its order denying applicants' Motion to Intervene either as a matter of right or permissively.

DATED this 2nd day of March, 1990.
POHLMAN & SANDERS
A Professional Association
Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial Address Omitted]

[Caption Omitted]

No. CIV 88-1854 PHX PGR

MOVANTS ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK'S REPLY RE: THEIR MOTION TO INTERVENE

On February 6, 1990, the Court issued a Memorandum Decision and Order declaring that Article XXVIII of the Arizona Constitution violated the First Amendment of the United States Constitution. On February 15, 1990, Arizonans for Official English Committee and Robert D. Park ("Movants") filed a Motion to Intervene After Judgment for purposes of appeal. On March 2, 1990, plaintiff and defendants filed Responses to the Motion to Intervene; defendants have no objection to the intervention.[1]
[2]

[1]On February 16, 1990 Defendant Corbin filed a Motion to Alter or Amend Judgment. On March 2, 1990, the State of Arizona, ex rel. Attorney General Robert K. Corbin, filed a [2] **(CONT.)** Motion to Intervene. Because movants are not yet admitted to the case and because movants are reluctant to use a reply memorandum to address issues not raised in Plaintiff's Response to the Motion to Intervene, North v. Madison Area Association for Retarded Citizens-Developmental Centers, 844 F.2d 401, 405 n.6 (7th Cir. 1988), movants have not addressed either Motion in this Memorandum.

I. PLAINTIFF DOES NOT UNDERSTAND THAT THIS MOTION IS FOR POST-JUDGMENT INTERVENTION.

Plaintiff's Response to Motion to Intervene of Arizonans for Official English Committee and Robert D. Park ("Plaintiff's Response") opposes intervention by movants using interesting, but irrelevant citations; this motion is for intervention after judgment, a distinctly different situation than exists in the cases she cites.

Plaintiff does not address the long line of Supreme Court and Ninth Circuit cases involving intervention after judgment. See, e.g., United Airlines v. McDonald, 432 U.S. 385, 97 S. Ct. 2464 (1977). In McDonald, stewardesses dismissed for violating a no-marriage rule proved a violation of Title VII; after the airline settled with several named plaintiffs, a putative class member[2] moved to intervene after judgment. The Supreme Court, in McDonald, 432 U.S. at 394 n.16, cites many cases supporting intervention after judgment, including Pellegrino v. Nesbitt, 203 F.2d 463 (9th Cir. 1953). Justice [3] Stewart, for the Court, said: "The critical inquiry in every such case is whether in view of all the circumstances, the intervenor acted promptly after the entry of final judgment." 432 U.S. at 394-5. In McDonald, the Court held that filing a motion to intervene within the period for appeal was timely filing. 432 U.S. at 396.

[2]Post judgment intervention for the purpose of appeal has been found to be timely even in litigation that is not representative in nature and in which the intervenor might therefore be thought to have a less direct interest in participation in the appellate phase." (citation omitted.) 432 U.S. at 395, n.16.

II. **PLAINTIFF'S OBJECTIONS ARE MISPLACED.**

In light of McDonald and similar federal cases allowing post-judgment intervention, none of plaintiff's objections to intervention are valid:

A. Movants filed in time. (Plaintiff's Response, 4.)

Movants filed their motion less than ten days after the decision was handed down. "[T]he respondent filed her motion within the time period in which the named plaintiffs could have taken appeal. We therefore conclude that the Court of Appeals was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted." 432 U.S. at 396.

B. Movants did not need to intervene earlier. (Plaintiff's Response, 4-6.)

Movants might have moved prior to the consideration of the motion to dismiss the complaint[3]. Sensitive to the [4] jurisprudential need to avoid multiplying litigation, however, Movants chose to abide by the principles of Federal Rules of Civil Procedure 1: "They [these rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

The Supreme Court in McDonald, a case which

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[3]The proceeding which plaintiff refers to as a "full trial proceedings", Plaintiff's Response, 4, was, in fact, a series of hearings on motions to dismiss, which the Court chose to treat as motions for summary judgment following the presentation of evidence beyond the pleadings. Memorandum Opinion and Order, Feb. 6, 1990, 3. The parties stipulated to combining the "trial on the merits" with the evidentiary hearing on plaintiff's [4] motion for preliminary injunction. Id.

determined the timeliness of post-judgment intervention in just such situations, warned that "[i]ntervention at that [earlier] time would have made the respondent a superfluous spectator in the litigation ... Moreover, such a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination." 432 U.S. at 395, n.15[4].

Nor is plaintiff's complaint that she did not have access to discovery against movants well taken. Plaintiff knew of movants' status as proponents and of movants' presence within [5] the district; at all relevant times during these proceedings, movants were amenable to discovery or subpoena. See, e.g., Index of Exhibits to Plaintiff's Statement of Facts in Support of Applications for Temporary Restraining order and Preliminary Injunction, Exhibits No. 2, 4 ("The chief spokesman for the ballot measure, Bob Park, ... chairman of Arizonans for Official English ..."), 7 ("Bob Park, the chief spokesman for the ballot

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[4]Plaintiff contends that City of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), cert. denied sub nom. Irvine v. County of Orange, 480 U.S. 946, 107 S. Ct. 1605 (1987), suggests that movants motion is untimely. In Orange, settlement negotiations had gone on for five years with many different parties; disrupting the negotiations by allowing intervention, the district court specifically found "would be tantamount to disaster here." 799 F.2d at 538. No such delicately balanced and complex negotiations are at work in this case--movants do not seek new trial level proceedings, only the appeal of a judgment. Nor do courts read this case as requiring all potential intervenors to second-guess every possible outcome. Grubbs v. Norris, 870 F.2d 343 (6th Cir. 1989) (adopting City of Orange standard, but refusing to "demand of potential intervenors that degree of prescience.")

measure, ... chairman of Arizonans for Official English). Plaintiff had every opportunity to join necessary third parties or to avail herself of discovery against movants at any stage of the proceeding. Federal Rules of Civil Procedure 19, 20, 26, 27, 30, 34(c), 45; United States Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72, 108 S. Ct. 2268, 2272 (1988). She cannot now claim that movants should be denied participation in this case because she chose not to exercise the available discovery rights she now claims were essential.

C. Plaintiff would not be prejudiced by intervention. (Plaintiff's Response, 5.)

Leaving aside plaintiff's claim that she would be prejudiced by not having exercised her discovery rights against movants, Plaintiff's Response, 4-5, plaintiff would suffer no prejudice from the "considerable delay and expense to which she would be subjected by an otherwise non-existent appeal." Id., at 5. She should have known that an appeal was a possibility when she filed the suit; having to defend a judgment on appeal is [6] not the kind of prejudice which will defeat post-judgment intervention for the purpose of appeal:

> "United argues that it was unfairly surprised when after having settled the case with all of the original and intervening plaintiffs it nonetheless faced an appeal .... The respondent's motion to intervene was filed less than three weeks after the "settlement" was incorporated in the District Court's final judgment, and necessarily concerned the same evidence, memories, and witnesses as the subject matter of the original class suit,' [citation omitted]. There is no reason to believe that in that short period of time United discarded evidence or was

> otherwise prejudiced."

McDonald, 432 U.S. 394, n.14. The whole purpose of post-judgment intervention for appeal is to allow appeals of decisions which would otherwise not occur.

D. Movants have legally-protected interests in their initiative. (Plaintiff's Response, 6-7.)

The assertion that movants, proponents of the initiative which placed Article XXVIII on the ballot have no interests in the continued vitality of the amendment, flies in the face of numerous cases holding that proponents of initiatives have legally-protectable interests in challenges to their political activities[5]. See, e.g., Continental Illinois National Bank and [7] Trust Co. of Chicago v. State of Washington, 696 F.2d 692 (9th Cir. 1983) (proponent of initiative allowed to intervene in utilities' challenge of initiative as violative of Contract Clause); Energy Fuels Nuclear, Inc. v. Coconino County, 766 P.2d 83, 159 Ariz. 210 (1988) (en banc) (proponents of initiative allowed to intervene)[6]. As the Supreme Court of California (en banc) noted recently: "Permitting intervention by the initiative proponents under these circumstances would serve to guard the people's right to exercise initiative power, a right that must be jealously defended by the courts." Building Industry Association of Southern California, Inc. v. City of Camarillo,

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[5]Unlike some other circuits, the Ninth Circuit does not require either satisfaction of the Article III standing requirements or a specific legal or equitable interest test. Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989); Sagebrush Rebellion v. Watt, 715 F.2d 525, 527-9 (9th Cir. 1983); County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980).

[6]See also, several cases cited in Movants' Memorandum supporting their Motion.

718 P.2d 68, 75, 226 Cal.Rptr. 81, 87 (1986) (en banc).

Plaintiff's reliance on Diamond v. Charles, 476 U.S. 54, 106 S. Ct. 1697 (1986) is misplaced. That case is inapposite on its face; the Supreme Court itself noted that Charles involved "the prosecutorial decisions of the Federal Government," Maine v.Taylor, 477 U.S. 131, 137, 106 S. Ct. 2440, 2446 (1986). This case does not involve criminal statutes, nor does it involve prosecutorial discretion of the Federal Government. This case involves proponents of an initiative who have spent hundreds of thousands of dollars and many months of work exercising their [8] political rights. These legally-protectable interests give rise to the kind of standing and rights which should require intervention.

E. The Governor's decision not to appeal prejudiced movants. (Plaintiff's Response, 9-10.)

Plaintiff's position that the Governor's failure to appeal did not prejudice movants because it was "considered," (Plaintiff's Response 10), and because movants could sue to enforce the now-declared unconstitutional amendment in state court (Plaintiff's Response 7-8), is ludicrous. The entire purpose of post-judgment intervention is to appeal decisions which affect non-parties. Here, the Governor's decision not to appeal triggered significant rights in movants: "The failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interest of the interveners (sic] was inadequate ... At least one of the rights that cannot be protected without intervention is the right of appeal." Wolpe v. Poretsky, 144 F.2d 505, 507-8 (D.C. Cir.), cert. denied, 323 U.S. 777 (1944).

In addition, plaintiff's "adequate representation"

argument would fail in light of Governor Mofford's nationally-publicized opposition to Article XXVIII. There is no requirement that movants demonstrate that the State's representation of their interests actually is inadequate. The Supreme Court and the Ninth Circuit make plain that "[tlhe requirement of the Rule is satisfied if the applicant shows that representation of his [9] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Legal Aid Society of Alameda Co. v. Dunlop, 618 F.2d 48, 50 (9th Cir. 1980), citing Trbovich v. United Mine Workers, 404 U.S. 528, 538-9 & n.20, 92 S. Ct. 630, 636, n.10. (1972). Plaintiff did not trust the State and its highest official to protect her interests even though the Governor publicly supported plaintiff's position. Her doubts about the adequacy of such representation resulted in this action. Yet, plaintiff now asserts movants should be content to trust such representation of their interests. The Governor's refusal to appeal the Court's decision is specific evidence movants cannot entrust their interests to such representation. The Trbovich standard of doubt as to the adequacy of such protection of movants' interests is more than satisfied and intervention is appropriate.

Nor would any reasonable person try to get a state court to override a federal court's determination that its state constitution violated the U.S. Constitution. "Although the Court's ruling would not bind the applicants absent their participation, any future action they may initiate would labor under the oppressive weight of an adverse precedent on the same facts. The mere prospect of an undesired precedent has been identified as a practical impairment." Usery v. Brandel, 87 F.R.D. 670 (W.D. Mich. 1980), citing Natural Resources Defense Council v. United States Nuclear Regulatory Cmmsn, [10] 589 F.2d 1341, 1345 (10th Cir. 1978); Francis v. Chamber of Commerce of the U.S., 481 F.2d 192, 195 n.8 (4th Cir.

1973).

III. CONCLUSION

Plaintiff has not identified any obstacle to post-judgment intervention. The Federal Rules of Civil Procedure, the Supreme Court and the Ninth Circuit all recognize that post-judgment intervention is appropriate in circumstances where a movant's interest would otherwise be impaired and representation (measured by a "minimal" standard) would be inadequate. This is such a case. The Court should allow intervention by movants.

Respectfully submitted this 12th day of March, 1990.

GUST, ROSENFELD & HENDERSON
By James F. Henderson
Attorneys for Arizonans for Official English Committee
And Robert D. Park

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARIA-KELLY F. YNIGUEZ, et al.,
Plaintiff,
vs.
STATE OF ARIZONA, et al.,
Defendant.

No. CIV-88-1854-PHX-PGR
Phoenix, Arizona
March 26, 1990
2:01 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL G. ROSENBLATT
UNITED STATES DISTRICT JUDGE

MOTION TO INTERVENE
MOTION TO ALTER OR AMEND JUDGMENT

APPEARANCES:
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* * * * *

[21]
THE COURT: Thank you, Counsel.

Let's hear now the Committee's and Mr. Parks' motions to intervene.

BY MR. HENDERSON:

Thank you, Your Honor.

* * * * *

The decision of this Court voids the political speech and the political interests of both the Committee and of Mr. Parks. For each of those reasons, Mr. Parks is chairman and individually involved himself in several months of work to get this initiative on the ballot.

They had 1,000 volunteers working on this. 200,000 petition signatures and 9700-some Arizonans made contributions [22] for the benefit, and some $307,000 was expended to put on this campaign.

The money issue is not the main issue, however. It is the fact that the franchise of 580,000 other voters in addition to Mr. Parks is affected and has been invalidated by this Court's opinion.

Now the question of, do advocates of initiatives have a right to intervene, and particularly at this point. I point out to the Court that we have two very specific opinions in the 9th

Circuit Court of Appeals, one in Sagebrush Rebellion v. Watt, and the other in Washington State Building & Construction Trades Council v. Spellman, 1982 and a 1983 case which specifically recognize the right of initiative advocates to intervene in these actions at this point.

The next issue that we must address is the one of timeliness. Counsel has said --

THE COURT:

Let me interrupt first on a procedure question.

MR. HENDERSON:

Certainly.

THE COURT:

Rule 24 specifically requires, in addition to the motion, a pleading of type, an answer or complaint, whatever form it may take, to fully set forth for the benefit of the Court and the opposition the nature of its right to intervene.

Has there been any such pleading filed in support of [23] the motion?

MR. HENDERSON:

Only to the extent of setting forth in a memorandum, Your Honor, attached to the motion and to the particular form of the notice of appeal which we have attached that indicated we would file if permitted to intervene.

THE COURT:

It says the motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim for the defense for which intervention is sought.

MR. HENDERSON:

We believed, Your Honor, that the memorandum attached to and supporting the motion did both of those things.

THE COURT:

I see.

MR. HENDERSON:

Then to the question of timeliness. The plaintiff has

complained here that by our not coming in and attempting to intervene earlier, that they were deprived of discovery opportunity relative to us.

This, I think, is a nonexistent situation, because the name of Robert Park has been mentioned during the course of these proceedings. Plaintiff Gutierrez mentioned it, although he had his first name wrong, in his testimony on the witness stand. They knew Mr. Park existed and he was available for any discovery.

However, that becomes wholly irrelevant for the simple reason that there was no real discovery per se, and the counsel for the attorney general indicated in his pleadings that [24] actually the facts were stipulated facts here.

But setting that aside, we did not earlier attempt to intervene here for the simple reason we believed the interests of these voters were sufficiently protected by the advent of the attorney general and the governor in this state.

And as the United States Supreme Court has said in the United Airlines vs. McDonald case, at Page 2470 of the Supreme Court Reporter, Number 97:

> "Intervention at that time would only have made the respondent a superfluous spectator in litigation for nearly three years, less time here, of course, for the denial of class certification was not appealable until after final judgment.
>
> "Moreover, such a rule would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination."

And in this instance, we believed that was actually the situation, since we have come to question whether we've -our interests were adequately represented here.

Now, again, from the United Airlines vs. McDonald

case, the Supreme Court has indicated that a post-judgment motion is appropriate for us to seek intervention on. And from the very same page of the Supreme Court Reporter, they allude [25] to the case in the 9th Circuit of Pellegrino vs. Nesbit, noting its similarity.

And there there was a corporation which had filed an action against the corporate officers to recover short swing profits, and the district court entered into judgment for the defendants. And when the corporation failed to appeal, a shareholder sought intervention for that purpose. And the Court of Appeals reversed the district court which refused it, ruling the motion was timely and that post-judgment intervention for the purpose of appeal was timely even in litigation that is not representative in nature, and in which the intervenor might therefore be thought to have a less direct interest in participation in the appellate phase.

We suggest to the Court that we do not have a lesser interest in the appellate phase in this particular instance.

THE COURT:

Let me ask you a question about being representative in nature now. What kind of an organization is the Committee?

MR. HENDERSON:

The Committee was a, in effect, a political action committee which was instituted for the purpose of circulating petitions to get this initiative on the ballot.

THE COURT:

Unincorporated association, is it that?

MR. HENDERSON:

Yes. Actually, Your Honor --

* * * * * * * * *

[32]

MR. HENDERSON:

The Attorney General representing the state and the Governor at the February hearing before this Court mentioned

at one point, as we read that transcript, that he wanted to talk about the First Amendment. But then the discussion got off on another aspect and it never did get back to the First Amendment consideration.

THE COURT:

And how would you raise this issue with the 9th Circuit Court of Appeals if permitted to intervene?

MR. HENDERSON:

I would tell the 9th Circuit Court of Appeals that the First Amendment is a content interested amendment. It is interested in giving people the ability to say what they think, what they feel, what they believe. It does not prohibit them giving it in, let's say in a New England accent or a southern accent, or any particular dialect, or German or Japanese or Spanish, or any other language. It says you have the right to speak your mind and say what you think. It's what you say, not how you say it.

We feel that is a very, very strong and important point in this instance.

THE COURT:

And you feel that was not presented to this Court?

MR. HENDERSON:

What -- what -- from what I have been able to see, the record, Your Honor, and the pleadings, I do not feel it was presented to the extent that it could and should have been.

[33]

I would suggest there was one other aspect that I do not think was fully presented to this Court which could have been, and that is the fact that no court that we could find has ever held that the First Amendment protects an on-the-job choice of language to use.

There are two cases in the 5th Circuit Court of Appeals which indicate that this is the case. One is a truck driver who was required to speak English on the job, and another was a

finding by that court which said that an English-on-the-job rule, only, did not discriminate on the basis of national origin as applied to a bilingual employee.

And probably most important is the Jurado vs. 1150 Corporation, 9th Circuit Court of Appeals 1987 case. That case involved Juarado, a disc jockey, who was forbidden to use Spanish in his broadcast.

THE COURT:

But I have to interrupt you here, because I don't know of anyplace in this Court's opinion that said that anyone could use any language that he or she chose in the performance of their jobs.

MR. HENDERSON:

No, I agree, Your Honor. I think that is absolutely correct.

However, that is the point, also. And the point is simply that requiring this woman and any other employee of the State of Arizona to perform official acts in the English language is not discriminatory on the basis of origin or any

* * * * * * * * *

[44]

MR. HENDERSON:

I think the appealable interest is simply that Robert Park, an individual intervenor as well as chairman of the committee, has had his vote denigrated and voided. 580,000 others in this state have done likewise. There has been a lot of timely effort.

And we balance this, if I may, Your Honor, against -

THE COURT: So we --

MR. HENDERSON:

-- the plaintiff against this case, who has said, I have not been forced by my supervisor, I have not been forced by the attorney general, I have not been forced by the governor of the State of Arizona to do anything. But up here, I'm worried, I'm

concerned, I'm afraid that maybe if I speak Spanish at all while I'm working between eight and five or whatever hours we work, I am violating the constitution.

And yet, on the other side of the fence, we have the franchise rights of voters which not only have been threatened, they have been done away with by your decision which has said that particular provision of our constitution is void.

Now, I have a lot of respect for a legislature. Some people say maybe I shouldn't, but I think it's much more important for the constitutional provision than it is a statute. And I think the importance of the constitutional aspect all by itself, as well as doing away with the right of those voters to have their votes counted, observed and [45] respected, mandates that we be permitted to intervene for this appellate purpose.

We contemplate taking no further testimony whatsoever that would have any effect on anything that's gone before. We live with what's before this Court thus far. And we believe that it's a matter of interpretation and that that interpretation is contrary to what this Court has found.

THE COURT:

Thank you, Counsel.

MR. HENDERSON:

Thank you, Your Honor.

* * * * * * * *

[46]

MR. CHING:

Third, in terms of the releases signed by Miss Yniguez, we never said that it's okay for her to sign the releases.

* * * * * * *

[47]

THE COURT: Thank you, Counsel.

Before the Court are several matters, and by way of

introductory remark the Court would simply state that the appellate process is the trial court's security blanket. The court sits by itself and makes its rulings, with the great comfort of knowing that there can be an appeal procedure, there is an appeal procedure whereby at least a panel of judges, if not more, can review in hindsight the rulings made by the court and thereby insure that the lower court's position was not in error.

Sometimes we believe that those decisions are rendered and we were not in error to begin with. Nevertheless, the comforting nature of the process is such that we simply accept those appellate decisions and move on down the road. So, we make our rulings in contemplation that they will be reviewed.

I guess if this Court had a personal preference it would be that, indeed, this matter be appealed. But it's not a decision that this Court simply has discretion to permit after taking what the Court believes was a very careful and scrutinizing view of Article 28, in analyzing both the claims of the plaintiffs and the positions of the respective defendants, and applying all the rules of constitutional law that were presented to it, and concluding in a rather restrictive nature that the amendment was unconstitutional.

That obligation and duty pertains to the motions to [48] alter or amend as well as to the motions to intervene. So, they have to be analyzed separately.

Dealing first with the motion to alter or amend the judgment. And while I will be making these rulings orally from the court, I will tell you now that there will be a formal memorandum and order prepared so that you will have a full understanding of the Court's position on the various motions.

But I want to give you a brief idea of the Court's rationale here this afternoon as to the motion to alter or amend the judgment. And in view of the Booksellers case, cited by the attorney general, it appears to the Court that certifications at this stage would simply only compound a very difficult

situation.

The Court has determined in consideration of the abstention issue, and quite frankly I wish we had had the certification issue presented more fully. We did consider it in the analysis of the motions, and quite frankly, simply overlooked it in our memorandum and order. But, basically we've discussed and addressed this issue when we discussed the abstention issue.

We have determined in the opinion that the statute was not obviously susceptible to a limiting instruction and on that basis, abstained.

If we certified the question in the face of that finding, we would simply be saying to the Arizona Supreme [49] Court, why don't you take another look at this amendment, and would you like to rewrite it in view of this Court's decision on the First Amendment issue and report back to us. That's -that's a poor choice of words, but that's, in effect, what we would be asking them to do. And that is not an appropriate act for a district court to undertake.

As far as Attorney General Corbin's motion to intervene, it is quite clear that the reference statute, 28-2403(b), does not pertain to the situation here. That statute is intended to address those situations where private litigations, private litigators, or perhaps some remote state agency or officer is involved, or particularly where none is involved at all, and yet has been brought into question the constitutionality of the statute of the state.

By no stretch of the imagination can we conclude that Governor Mofford is not a party to the litigation, albeit she has apparently expressed a disinterest in appealing. The attorney general was party to the lawsuit until he was dismissed on his own motion.

That statute, 28 USC 2403(b), does not give this Court the authority to permit intervention. Should the Court simply

construe that as a matter of spirit and purpose so that we could get this matter appealed, I just don't believe that that would be a fair interpretation of the law as it pertains to intervention by a party who has successfully been dismissed [50] from the litigation.

If there are other grounds which the attorney general suggests would permit review by the appellate courts of a motion to intervene based on the interest of justice, and other authority, then that's a matter that the attorney general should argue to the 9th Circuit. I don't believe that that court has the power and authority to permit intervention under 2403(b), or under the state statute, Arizona Section 41-193(a)(3), to intervene in this action at this time.

The analysis as it pertains to the Committee and Mr. Parks is more difficult. First of all, there are two rules that apply. We have intervention of right as provided by Rule 24(a), and intervention by permission, permissive intervention as governed by Rule 24(b).

The law is quite particular as to intervention. We have the procedural defects that the Court mentioned. One, that the statute -- the rule specifically requires accompanying pleading setting forth the claim or defense for which intervention is sought. That isn't in the case, but I'm not too concerned with it, based on the representation that the moving papers themselves may set forth the claim or the defense for which intervention is sought. Procedurally I think it's defective. I don't think it's, perhaps, fatally defective.

And now we're dealing with the procedure irregularity as far as the Committee is concerned. Does this committee have [51]capacity to intervene in this lawsuit? The closest that we can conclude, based on the representations of counsel, is that it's an unincorporated association. There is no state statute which allows it to be a litigant. There's some law which permits unincorporated associations to be -- to sue or be sued.

If there is some substantive right existing under the constitution or laws of the United States, it's not clear how this provision should be applied to this type of situation. Except that it's representing that the federal substantive right is based on notions of federalism, I don't know that there's any legal authority for the Committee to intervene.

Putting that aside, and presuming for the moment that it does have capacity to intervene, we then have to look at the 9th Circuit tests on intervention. And the first test is, as counsel points out, is timeliness.

Insofar as this being a post-judgment motion for intervention, and insofar as the motion to intervene was made as soon as it was determined that Governor Mofford was not interested in appealing the Court's decision, the Court must conclude that it is timely.

That's somewhat questionable because, as the plaintiffs point out, had the motion to intervene been made earlier, and had it been granted, then perhaps discovery could have raised or disclosed factual matters which would then have brought into play the equal protection arguments which the [52] Court avoided in the rendering of its opinion, but which may have been more apparent and would have warranted the Court's attention if the parties had moved to intervene earlier in the litigation.

There is a flip side of that, and that is that a motion to intervene, as the intervenors point out, probably would not have been granted because of the fact that it did appear, probably would appear that early on that there was adequacy of representation of interests which were being protected, which would have forclosed their right to intervene earlier on. We'll never know that because the motion was not broader here.

Another critical test that is placed upon this Court's determination concerning intervention is whether or not the Committee and Mr. Parks have standing or the interest

necessary for intervention.

This gets complicated in the analysis because there is an interest requirement that is a different one from the appealable interest requirement which we are confronted with based on the status of the record at this stage, the judgment having been entered and this being a post-judgment motion for intervention.

An amorphous quality here. What is -- what is standing? What is the appealable interest? What is the intervention interest? It must be more than simply a matter of [53] great concern.

We have a substantial body of law which deals with legal or equitable interest which is placed in jeopardy. There has to be an injury. There has to be some showing that intervention is a matter of right, so that the interests of the parties seeking to come in can have their rights formally determined.

There are tests that apply to that particular finding requirement. An organization can obtain standing in two ways. By showing concrete injury to itself, its organization's welfare or interests, or in an associational capacity, even if it has not been directly injured, if its members would otherwise have standing in their own right. A critical test.

And two, if the interests of the organization, the interests which the organization seeks to protect are germane.

Three, that neither the action nor the relief sought required participation by the individual member or members.

So, when we get through the analysis to that stage, we can conclude that the interest doesn't arise simply because the intervenors have some type of a binding interest in the litigation.

Mr. Parks' interest now separated from the Committee's interest cannot be based simply on the fact that his vote has now been nullified. That's not what the Baker v. Carr cases hold. They deal with the dilution of the franchise, not with [54]

the abolition of the franchise.

So that the mere fact that Mr. Parks believes that he is protecting the interests of the many people who voted in support of the constitutional amendment does not in and of itself warrant intervention. The 9th Circuit has said that mere interest in establishment of a legal precedent is not sufficient to create an appealable interest. No one has an absolute constitutional right to appeal.

If the Committee has any type of standing in this case, it must be based on the injury to its own interest. And it's very difficult to see how the injury is directed toward the Committee itself. The fact that its efforts and the money that it expended is now apparently wasted is not sufficient by itself to confer standing.

The Sagebrush Rebellion case does say that public interest groups should be granted an intervention of right to challenge the legality of government actions. Even that is pointed out in the dissent must bear some relationship to standing to appeal. If that were not so then in any litigation public interest groups would be permitted to intervene.

There must be a significantly protectable interest, and that significantly protectable interest doesn't automatically apply to every voter. The fact that the case may rest at this stage, not be appealed, is not grounds for intervention.

[55]

The test, 9th Circuit test then moves into the impairment of interest. As long as the case rests in its present posture, there is no impairment of interest. It's simply brought in any court in this state, by any private citizen who seeks to have an interpretation determining that somebody has violated the provisions of Article 28.

It's this ground that troubles this Court more than any. As I indicated, the matter should be appealed. It would be helpful to have precedential status one way or another obtained

by this decision. But, it's not in the Court's power to simply determine that appeal is in everyone's best interest.

There's a slight difference in the analysis as it pertains to Rule 24(b), but basically it comes down to the same lack of standing that the Court believes prohibits intervention as matter of right.

As I indicated, we will prepare a formal memorandum and order which will be the basis for your appeal from this Court's decision. It's quite obvious that there will be an appeal. It's quite obvious that there should be an appeal. But now the appeal must be from the Court's denial of the motion to alter or amend the judgment and from the Court's denial of the motions to intervene.

The Court still has its security blanket in the form of the 9th Circuit. If they believe that you should be permitted to intervene, then they certainly can do that.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

130 F.R.D. 410

Maria-Kelly F. YNIGUEZ and Jaime P. Gutierrez, Plaintiffs,

v.

Rose MOFFORD, individually and as Governor of the State of Arizona, Robert K. Corbin, individually and as Attorney General of the State of Arizona, and Catherine Eden, individually and as Director of the Department of Administration of the State of Arizona, Defendants.

No. CIV 88-1854 PHX PGR.

United States District Court,

D. Arizona.

April 3, 1990.

***411** Robert J. Pohlman, Phoenix, Ariz., for plaintiffs.

Anthony B. Ching, Sol. Gen., Phoenix, Ariz., for defendants.

MEMORANDUM OPINION AND ORDER

ROSENBLATT, District Judge.

On February 6, 1990, the court declared that Article XXVIII of the Arizona Constitution, ***412** entitled "English as the Official Language", was unconstitutional on its face in violation of the First Amendment of the United States Constitution, 730 F.Supp. 309. Because Governor Rose Mofford, the sole remaining defendant, has stated that she has no intention of appealing that ruling, two post-judgment motions to intervene are pending before the court: the State of Arizona ex rel. Attorney General Robert K. Corbin's Motion to Intervene, filed March 2, 1990, and the Arizonans for Official English Committee and Robert D. Park's Motion to Intervene, filed February 15, 1990. Also pending is

defendant Corbin's Motion to Alter or Amend Judgment, filed February 16, 1990. For the reasons set forth herein, as supplemented by the reasons stated by the court during its bench ruling on these motions on March 26, 1990, all three motions will be denied.

MOTION TO ALTER OR AMEND JUDGMENT

Defendant Corbin, in a timely manner, has requested pursuant to Fed.R.Civ.P. 59(e) that the judgment entered in this action be altered or amended because the court's memorandum opinion and order failed to dispose of the defendants' request that the state law question be certified to the Arizona Supreme Court. Assuming, without deciding, that Corbin has standing to bring this motion in light of his dismissal as a party defendant, the court finds that such a certification would be inappropriate.

The court initially notes that neither the defendants' Motion to Supplement Argument, in which the certification issue was raised in one conclusory paragraph, nor Corbin's instant motion specifies what the "state law question" is that should be certified. In light of Corbin's reply memorandum in support of the instant motion, the court construes the motion as requesting that the court certify to the Arizona Supreme Court the question of whether the narrow interpretation of Article XXVIII proffered by Corbin in Attorney General Opinion I 89-009 is a valid construction of the Article.

While Corbin is correct that the court's opinion did not specifically resolve the certification issue, an inadvertence on the court's part, the conclusion that the certification request must be denied is implicit in court's reasoning underlying its denial of the defendants' request that the court abstain from deciding the constitutionality of Article XXVIII. Given this court's conclusion that Article XXVIII is not obviously susceptible of a construction that

would eliminate its unconstitutional overbreadth, any certification of the validity of the proffered narrowing construction would be improper inasmuch as it would be "ask[ing] a state court if it would care in effect to rewrite a statute." *City of Houston, Texas v. Hill*, 482 U.S. 451, 471, 107 S.Ct. 2502, 2515, 96 L.Ed.2d 398 (1987).

The Court is unpersuaded by Corbin's assertion that *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), requires certification given the Supreme Court's acknowledgement in that case that its decision to certify a narrowing construction of the state statute proffered by the state attorney general, rather than deciding itself whether the state statute was readily susceptible of the attorney general's interpretation, was due to the unusual factual and procedural circumstances of that case. The unique situation which led to certification in *American Booksellers* is not present here and under the circumstances of the instant case, certification would entail both disadvantage and cost since it would only unnecessarily prolong the limbo of uncertainty that Article XXVIII created for those adversely affected by its chilling effect.[1]

***413** CORBIN'S MOTION TO INTERVENE

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[1] The fact that this court's opinion declaring Article XXVIII facially unconstitutional was not issued for more than nine months after submission does not indicate, as Corbin asserts, that there was no urgency in this case. If the delay in ruling indicates anything, it is how overtaxed the court's limited resources have become by its ever increasing caseload. Had the court had the luxury of the resources that the parties committed to this action, such as the eight attorneys and almost 800 hours of work that the plaintiffs submit they put into the prosecution of this action, the court would have ruled in the expedited manner that this type of case deserves.

Corbin, on behalf of the State of Arizona, has moved to intervene as a defendant in this action so that he may participate in all post-judgment proceedings, including an appeal. Both Corbin and the State were named defendants in this action and both filed motions to dismiss which the court subsequently granted. Corbin's assertion that he now has standing to intervene on the State's behalf is premised solely on 28 U.S.C. § 2403(b), which provides in part that when the constitutionality of a state statute is drawn into question the court shall certify that fact to the state attorney general and shall permit the state to intervene to present evidence, if appropriate, and to argue the constitutionality of the statute.

The court has no authority to permit Corbin to intervene under § 2403(b) because that statute authorizes intervention by a state attorney general only in actions "to which the State or any agency, officer, or employee thereof is not a party". *Sovereign News Co. v. Falke*, 448 F.Supp. 306, 314 n. 13 (N.D.Ohio 1977), *remanded on other grds sub nom. Sovereign News Co. v. Corrigan*, 610 F.2d 428 (6th Cir.1979). It is undisputed that Governor Mofford is still a party defendant herein, and that the state, Corbin and Department of Administration Director Eden were formerly party defendants. It is further undisputed that Corbin, on behalf of himself and the other defendants, has already been allowed to present evidence and argue the constitutionality of Article XXVIII.

The court is aware of nothing in the legislative history of § 2403(b), and Corbin cites to none, that would require it to ignore the statute's plain language under the circumstances of the instant case. A denial of Corbin's request to intervene in no way ignores § 2403(b)'s spirit and purpose of ensuring that a state has the opportunity to defend the constitutionality of its laws. That opportunity is present in this case and if it is not further exercised, it is only

because Governor Mofford determines that the state's sovereign interests would be best served by foregoing an appeal.

OFFICIAL ENGLISH COMMITTEE & PARK'S MOTION TO INTERVENE

The Arizonans for Official English Committee ("Committee"), the main proponent of the initiative that placed Article XXVIII on the ballot, and Robert D. Park, individually and as chairman of the Committee, have moved to intervene in this action for the purpose of taking an appeal. They seek intervention both as of right and permissively, pursuant to Fed.R.Civ.P. 24.

The court initially notes that the Committee and Park have failed to comply with Fed.R.Civ.P. 24(c)'s requirement that their motion to intervene be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The proposed notice of appeal submitted as an attachment to the intervention motion does not satisfy Rule 24(c)'s requirement. Without condoning the procedural defect, and notwithstanding that even in post-judgment intervention cases it has been held that the failure to file the requisite separate pleading is fatally defective to a motion to intervene, *see e.g. Lebrecht v. O'Hagan*, 96 Ariz. 288, 394 P.2d 216 (1964) (construing an identical Ariz.R.Civ.P. 24(c)); *Hobson v. Hansen*, 44 F.R.D. 18 (D.D.C.1968); *Usery v. Bd. of Public Education*, 418 F.Supp. 1037 (W.D.Pa.1976), the court believes that the importance of this issue demands that it resolve the merits of the motion to intervene.

In order to be able to intervene the Committee must first have the legal capacity to be a participant in this litigation. Inasmuch as the Committee has stated that it is an unincorporated association without capacity to sue or be sued in its common name under Arizona law, its capacity to

intervene is dependent upon it coming within the purview of Fed.R.Civ.P. 17(b)(1)'s exception that an unincorporated association "may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." The Committee's contention that it has "representational capacity" is misdirected because while an unincorporated association's representation of its members ***414** may give it standing to intervene, it does not give it the legal capacity to intervene. The court will assume for the purpose of the instant motion that Rule 17(b)(1) has been satisfied here because the underlying action involves a substantive constitutional right.

Although post-judgment motions to intervene are generally disfavored, see 7C C. Wright, A. Miller, & M. Kane, *Federal Practice at Procedure: Civil* 2d § 1916 at 444-45 (1986), post-judgment intervention for purposes of appeal may be appropriate if certain requirements are met, the first of which is that the intervenors must act promptly after entry of judgment. *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1328 (9th Cir.1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980). Since the Committee and Park filed the instant motion nine days after the judgment was entered, which was well within the time period for filing a notice of appeal, the court finds that the motion to intervene is timely. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96, 97 S.Ct. 2464, 2470-71, 53 L.Ed.2d 423 (1977).

The second requirement is that the intervenors must meet traditional standing criteria. *Legal Aid Society of Alameda County*, 608 F.2d at 1328. Although the Committee and Park correctly assert that this circuit has adopted the general rule that a party seeking to intervene need not possess the standing necessary to initiate the

lawsuit, *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 521 (9th Cir.1977), *rev'd sub nom. and vacated on other grds, Bryant v. Yellen*, 447 U.S. 352, 100 S.Ct. 2232, 65 L.Ed.2d 184 (1980); *accord, Portland Audubon Society v. Hodel*, 866 F.2d 302, 308 n. 1 (9th Cir.), *cert. denied*, --- U.S. ----, 109 S.Ct. 3229, 106 L.Ed.2d 577 (1989), standing necessary to support an appealable interest must be present here given the purpose behind the Committee's and Park's desire to intervene, i.e. to prosecute an appeal because the named parties are either unwilling or unable to do so. *Imperial Irrigation Dist.*, 559 F.2d at 521; *Fisher v. Tucson School Dist. No. One*, 625 F.2d 834, 837 n. 1 (9th Cir.1980); *Legal Aid Society of Alameda County*, 608 F.2d at 1328 n. 9. The court concludes that none of the interests that the Committee and Park assert they possess in this action are sufficient to grant them standing to intervene, whether as of right or permissively, for purposes of taking an appeal; furthermore, none of those interests is sufficient to amount to the apparently lesser "significantly protectable interest" required by Fed.R.Civ.P. 24(a)(2), *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971), an interest that in this circuit need not be a specific legal or equitable interest as long as it is a protectable interest in the outcome of the litigation of sufficient magnitude to warrant inclusion in the action. *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir.1981).

An unincorporated association, such as the Committee, may have standing in its own right if it seeks judicial relief from an injury to itself or to vindicate its own rights. *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975). The only particularized injury allegedly suffered by the Committee is that the court's declaration of Article XXVIII's unconstitutionality has rendered "for naught" the substantial labors and resources it

committed to the promotion of the initiative that was enacted as Article XXVIII. Even assuming that the court's decision nullified the Committee's efforts, although no such nullification has actually occurred, the court does not believe such an impairment to the Committee's institutional interests is sufficient to meet either Article III's fundamental injury-in-fact requirement or Rule 24(a)(2)'s interest requirement.

The court realizes that the Ninth Circuit Court of Appeals has allowed public interest groups, such as initiative proponents, to intervene in actions to defend the product of the groups' efforts. *See Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir.1983); *Washington State Bldg. & Const. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 ***415** (1983); *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir.1980). The court does not consider these cases dispositive of the instant circumstances because the opinions are, unfortunately, all lacking in any illuminating legal analysis on the issue of intervention and, more importantly, do not involve post-judgment intervention for the purpose of taking an appeal. Such an intervention is, as the Committee and Park point out, a "distinctly different situation" from the normal intervention, and one that requires a stronger showing of interest to justify intervention. See 7C C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil* 2d § 1916 at 444-45. The court does not believe under these circumstances that the mere fact that an organization is a proponent of an initiative proposition, and has an abstract concern that is affected by the adjudication, is sufficient to create the concrete injury necessary for non-representational organizational standing.

The Committee, even in the absence of a sufficient injury to itself, may still obtain associational or

representational standing, although the possibility of such standing does not eliminate or attenuate the case or controversy requirement of Article III. *Warth v. Seldin*, 422 U.S. at 511, 95 S.Ct. at 2211. One of the requirements for such standing, and the only one at issue here, is that the members of the organization must otherwise have standing in their own right. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Although the standing of a single member is sufficient to meet this requirement, *E.E.O.C. v. Nevada Resort Ass'n*, 792 F.2d 882, 885 (9th Cir.1986), the Committee has not established that any of its members would have the standing necessary to have an appealable interest in this action. To the extent that the Committee, and/or Park, are attempting to represent non-members who voted in favor of the proposition, they may not do so under the prudential limitations on standing. *See Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979).

The only one of its members identified by the Committee is Park, its chairman. The Committee and Park allege that he has a sufficient interest because the court's decision herein nullified his vote in favor of Article XXVIII. While there is a concept referred to as "voter standing" that has arisen in malapportionment cases, *see e.g., Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) and its progeny, wherein the Supreme Court has found that disadvantaged voters had a sufficient particularized and objectively ascertainable injury in fact to confer standing because their votes had been diluted relative to the vote of other citizens of the same state, *In re United States Catholic Conference*, 885 F.2d 1020, 1028 (2d Cir.1989), such is not the case here. Even assuming that Park's vote has been "nullified", and it has not, his constitutional right to vote has

not been impaired or diminished by the court's action. While the fact that Park voted in favor of the proposition that enacted Article XXVIII may constitute an interest, it is too remote and general to constitute a significantly protectable interest for purposes of Rule 24(a)(2). *Fox Valley Reproductive Health Care Center v. Arft*, 82 F.R.D. 181, 182 (E.D.Wis.1979).

Furthermore, none of the reasons cited by the Committee and Park in support of their request to intervene permissively pursuant to Rule 24(b)(2) constitute grounds for finding that they have standing to appeal. For example, standing cannot be predicated upon a mere interest in the establishment of legal precedent, *United States v. Imperial Irrigation Dist.*, 559 F.2d at 521, nor on the fact that a conclusion that the Committee and Park do not have standing would perhaps leave no one willing and able to appeal. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974); *In re U.S. Catholic Conference*, 885 F.2d at 1031.

Even assuming that the Committee and Park meet the threshold interest test for intervention as of right, which the court finds they do not, the possibility that the ***416** court's declaration of Article XXVIII's unconstitutionality could affect their interests is too tenuous to meet the impairment requirement of Rule 24(a)(2). *See In re Benny*, 791 F.2d 712, 721 (9th Cir.1986). While *stare decisis* may, in appropriate circumstances, supply the practical impairment required for intervention of right, *Smith v. Pangilinan*, 651 F.2d at 1325, the degree of *stare decisis* arising from this court's decision is insufficient to be a practical impairment because, inasmuch as it is not binding on the Arizona state courts, *see Moore v. Sims*, 442 U.S. 415, 428, 99 S.Ct. 2371, 2379-80, 60 L.Ed.2d 994 (1979), it does not foreclose any rights of the Committee or Park in any future state court

proceeding arising out of Article XXVIII. *Cf. Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir.1977). Consequently, there has been no "nullification" of any vote cast in favor of the Article and no disenfranchisement of any voter.

If the Committee and Park had the requisite impaired interest necessary for intervention, which they do not, they would meet the inadequate representation requirement of Rule 24(a)(2). Since a party seeking to intervene as of right need only meet the minimal burden of showing that the representation of his interest may be inadequate, *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972), Governor Mofford's stated intention not to appeal the court's decision indicates that the present defendants do not fully represent the interests of the Committee and Park. *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir.1980). The court notes, however, that the assertion by the Committee and Park that the representation of the defendants is inadequate because the defendants did not raise certain issues concerning Article XXVIII's constitutionality that the Committee and Park would raise on appeal militates against a finding that the motion to intervene was timely filed. If the Committee and Park had any such arguments, they should have moved to intervene prior to the court's decision declaring Article XXVIII unconstitutional so that appropriate discovery could have been taken and more complete legal arguments could have been presented to the court. Therefore,

IT IS ORDERED that Defendant Corbin's Motion to Alter or Amend Judgment (doc. # 82) is denied.

IT IS FURTHER ORDERED that the State of Arizona Ex Rel Attorney General Robert K. Corbin's Motion to Intervene (doc. # 92) is denied.

IT IS FURTHER ORDERED that the Arizonans for Official English Committee and Robert D. Park's Motion to

Intervene (doc. # 78) is denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial Address Omitted]

[Caption Omitted]

No. CIV 88-1854 PHX PGR

NOTICE OF APPEAL

Notice is hereby given that Arizonans for Official English and Robert D. Park hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the Memorandum Opinion and Order entered in this action on the 3rd day of April, 1990, which states:

> "IT IS FURTHER ORDERED that the Arizonans for Official English Committee and Robert D. Park's Motion to Intervene (doc. #78) is denied"

which referenced Motion to Intervene was sought for the purpose of filing an appeal from that part of the Memorandum Opinion and Order entered on the 6th day of February, 1990, which ordered:

> "--- that Article XXVIII of the Constitution of the State of Arizona is hereby declared to be void as being invalid on its face in violation of the First Amendment of the Constitution of the United States."

Dated this 9th day of April, 1990.

WILLIAMS & JENSEN, P.C.
1101 Connecticut Avenue, N.W.
Washington, DC 20036-0500

Barnaby W. Zall

GUST, ROSENFELD & HENDERSON
By James F. Henderson
Attorneys for Intervenor-Defendants
Arizonans for Official English
Committee and Robert D. Park

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial address omitted]

[Caption Omitted]

_____)

CIV. No. 88-1854 PHX PGR

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Jaime P. Gutierrez hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment and Memorandum Opinion and Order entered in this action on the 6th day of February, 1990.

DATED this 20th day of April, 1990.

POHLMAN & SANDERS
A Professional Association
By: Robert J. Pohlman
2525 E. Arizona Biltmore Circle, Suite 220
Phoenix, Arizona 85016
AND
Bonn & Jensen, Chartered
805 North Second Street
Phoenix, Arizona 85004
Co-counsel for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-15546

[Caption Omitted]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
(NO. CIV 88-1854 PHX PGR)

AFFIDAVIT OF CAMERON WHITMAN

My name is Cameron Whitman. My business address is 818 Connecticut Avenue, Northwest, Suite 200, Washington, D.C. 20006. Unless I say otherwise, everything I say in this affidavit is said on the basis of my own personal knowledge.

(1) I am Field Director for U.S. ENGLISH, the largest organization promoting English as the official language of the United States and of the states. Since its formation in 1983, U.S. ENGLISH has actively promoted and supported the fourteen constitutional amendments and statutes declaring English the official languages of those states enacted during that period. U.S. ENGLISH is currently promoting statutes and constitutional amendments in the federal Congress and in several states.

(2) Among those proposals is a ballot referendum which will appear on the June 5, 1990 election ballot in Alabama and a legislative proposal in Missouri. I am familiar with those proposals and with the persons supporting and opposing those proposals.

(3) I am familiar with the February 6, 1990, March 26, 1990 and April 4, 1990 decisions in the lawsuit, *Yniguez v. Mofford*. I have read the written opinions, and have had them

and the oral opinion from March 26 described and explained to me by some of the lawyers involved in the lawsuit. In addition, I have read or had explained to me many of the most important legal decisions involving choice of language in the workplace, including the decisions on the Los Angeles bilingual radio d.j. [*Jurado v. 1150 Corp.*, 813 F.2d 1406 (9th Cir. 1987)] and the lumberyard and truck driver cases from Texas [*Garcia v. Gloor,* 618 F.2d 264 (5th Cir. 1980) and *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)].

(4) The effect of these decisions has been to slow, and in at least one case, halt, progress on similar legislative proposals in other states. I have received numerous questions about the decisions from legislators, persons who are promoting similar proposals, voters and media representatives. In virtually every case the legislators and proponents are confused and uncertain because of these decisions. In Missouri, for example, state Representative Franklin halted consideration of his statute because it was modeled on the Arizona constitutional provision struck down as unconstitutional by Judge Rosenblatt. In Alabama, where virtually all of the state's political leaders supported passage of the June referendum, I have had to discuss the decisions with dozens of interested persons, most of whom could not understand the court's rationale and hence could not understand how it might relate to them.

(5) In addition, the decisions of the District Court have created serious doubts about the legality of the official language statutes and constitutional provisions in the other sixteen states which have adopted English as the official language. A swift decision by this court could be the only way to remove the specter of unconstitutionality from those laws.

(6) I am quite experienced in explaining American jurisprudence and constitutional doctrines to laypersons who are not familiar with it. In addition to my work with state

legislators, I have extensive experience explaining American laws and political decisions to persons in other countries; before I joined U.S. ENGLISH, I served in American embassies in three countries, including, most recently, five years in Rome. Yet I find myself unable to explain adequately the judge's decisions in this case. I cannot explain how a law which has been declared unconstitutional can still be enforced in state courts. I cannot explain this new First Amendment right to choice of language on the job, nor can I reconcile this new right with the other court decisions I know about. In addition, I cannot explain why a decision striking down a part of the Arizona Constitution cannot be appealed. As a result, I am unable to help legislators and others understand these decisions so that they can avoid similar results in other states.

(7) I believe that rapid consideration by the U.S. Court of Appeals could avoid some of the chilling effect on legislators and political activists around the country. In particular, a decision that would allow an appeal of the District Court's opinion would, by itself, give legislators and political activists some hope that clarifications of their legal and constitutional duties might be forthcoming. In addition, a rapid decision on the merits of the case, either way, could help these legislators and political activists to avoid constitutional difficulties in the future.

I hereby swear under penalty of perjury that the foregoing is true, accurate and complete, to the best of my knowledge and ability.

Cameron Whitman

5 - 3, 1990

WITNESSETH, by my signature and seal below, that

the above-named affiant, Cameron Whitman, came before me, identified herself as such, swore under penalty of perjury that the information she provided in the above affidavit was true, accurate and complete, to the best of her knowledge and ability.

Notary Public

My Commission expires: 2-14-9?
DONE: This 3 day of May, 1990, in Birmingham, Alabama
Antitrust Bank

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
DECISION GRANTING INTERVENTION

939 F.2d 727

Maria-Kelly F. YNIGUEZ; Jaime P. Gutierrez,
Plaintiffs,
v.
STATE OF ARIZONA, Defendant-Appellee.
Robert D. Parks; Arizonans for Official English,
Applicants in intervention-Appellants.
Maria-Kelly F. YNIGUEZ; Jaime P. Gutierrez,
Plaintiffs-Appellees,
v.
Rose MOFFORD, individually and as Governor of the State of Arizona; Robert Corbin, individually and as Attorney General of the State of Arizona,
Defendants-Appellants.
Robert D. Parks; Arizonans for Official English,
Applicants in intervention-Appellees.
Nos. 90-15546, 90-15581.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Dec. 14, 1990.
Decided July 19, 1991.

***728** Robert K. Corbin, Atty. Gen., Anthony B. Ching, Sol. Gen., Paula S. Bickett, Asst. Atty. Gen., Phoenix, Ariz., for state appellants.

Robert J. Pohlman, Pohlman & Sanders, Phoenix, Ariz., for plaintiffs- appellees.

***729** Barnaby W. Zall, Williams & Jensen, Washington, D.C., for the appellant, movants & intervenors.

James F. Henderson, Gust, Rosenfeld & Henderson,

Phoenix, Ariz., for the appellants, movants, intervenors.

Appeal from the United States District Court for the District of Arizona.

Before TANG, FLETCHER and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

This case presents two novel questions concerning post-judgment intervention: first, whether the sponsors of a ballot initiative may intervene after judgment to appeal a decision holding the ballot initiative unconstitutional when the only defendant in the case chooses not to appeal; and second, whether the Attorney General, having argued for and won a dismissal of the suit against him in the district court, may intervene on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Arizonans for Official English ("AOE") and its spokesman Robert D. Park campaigned for adoption by ballot initiative of an amendment to the Arizona Constitution entitled "English as the Official Language." In the November 1988 general election, the Arizona voters approved the new constitutional provision. That new provision, Article XXVIII of the Arizona Constitution ("Article XXVIII") provides in part: English shall be the official language of the State of Arizona and all of its political subdivisions, that the Article is applicable to all branches of government and to all government officials and employees during the performance of government business, that the state and its political subdivisions shall take all reasonable steps to preserve, protect and enhance the role of English as the state's official language, that the state and its political subdivisions ... shall act only in English.... Section Four of Article XXVIII states that "[a] person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The

Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection." The Arizona legislature has not enacted any limitations on private lawsuits to enforce Article XXVIII.

Maria-Kelly Yniguez, an employee of the Arizona Department of Administration, ceased speaking Spanish while performing her official state duties immediately upon passage of Article XXVIII. She feared that under Article XXVIII she was vulnerable to discipline by her state employer if she were to continue to speak Spanish on the job. In November 1988 Yniguez sued (in a series of amended complaints) the State of Arizona, Governor Rose Mofford, Arizona Attorney General Robert Corbin, and Director of the Arizona Department of Administration Catherine Eden in federal district court. Yniguez sought an injunction against state enforcement of Article XXVIII and a declaration that it violates the first and fourteenth amendments of the United States Constitution.

The state defendants all moved for dismissal, arguing that the eleventh amendment barred Yniguez's suit and that there was no live "case or controversy," U.S. Const. Art. III, between Yniguez and any of the defendants. All of the state defendants were represented by the Attorney General's office. The district court then proceeded to issue a series of thoughtful and carefully reasoned rulings, most of which are not now before us.

On February 6, 1990, the district court dismissed all defendants from the suit except the Governor. The court held that the eleventh amendment bars suit against Arizona. The court further held that the Attorney General is an improper party under the doctrine of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), because he has no authority to enforce Article XXVIII against Yniguez. Therefore, the court held that the eleventh amendment also

bars Yniguez's suit against the *730 Attorney General. Although the district court found that Eden has authority to enforce Article XXVIII, she had not threatened to do so, and thus the court held that no case or controversy was ripe for adjudication as to her. The district court therefore dismissed Eden from the suit as well. Finally, the district court held that the Governor has the authority to enforce Article XXVIII against Yniguez and had sufficiently threatened to do so for Yniguez to sue her under *Ex parte Young*.

Having dismissed all the defendants except the Governor, the district court proceeded on the same date, February 6, 1990, to rule on the merits of Yniguez's claim. The court held that Article XXVIII is facially unconstitutional under the first amendment. It therefore granted Yniguez declaratory relief, but denied injunctive relief because there was no enforcement action pending. Governor Mofford – who had publicly opposed the adoption of Article XXVIII during the 1988 election – immediately announced her decision not to appeal the district court's opinion and order.

On February 16, 1990, AOE and its spokesperson Park moved to intervene post-judgment for the purpose of pursuing an appeal of the district court's order. They sought to intervene both as of right and permissively under Fed.R.Civ.P. 24. During arguments before the district court and this court, the attorneys for the Attorney General's office and for AOE and Park averred that AOE had inquired of the Attorney General at an early stage of the lawsuit whether he would vigorously defend the constitutionality of Article XXVIII, and that they had been assured that he would. Yniguez does not contend otherwise. On March 2, 1990, the Attorney General sought to intervene for the purpose of prosecuting the appeal pursuant to 28 U.S.C. § 2403(b).

On April 3, 1990, the district court denied both

motions to intervene. 130 F.R.D. 410. Although the court found that AOE's and Park's motion was timely, it denied it on two grounds. First, the court held that the prospective intervenors did not satisfy the Article III requirement of injury-in-fact necessary for there to be a justiciable controversy. In addition, the court denied the motion to intervene as of right on the ground that AOE and Park did not have an adequate interest in the litigation under Fed.R.Civ.P. 24(a)(2). The district court stated that its decision on the merits would not bind the Arizona courts, and therefore that AOE's and Park's ability to enforce Article XXVIII was not impaired by the decision.[1] The district court

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[1]In its written memorandum opinion and order denying the post-judgment intervention motion, the district court indicated that the reason its opinion on the merits would have no *stare decisis* effect in the Arizona courts was because the decision rested on an interpretation of state law. The district court cited *Moore v. Sims*, 442 U.S. 415, 428, 99 S.Ct. 2371, 2379, 60 L.Ed.2d 994 (1979) and *Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir.1977), both of which recite the familiar principle that state courts have the final word on the meaning of state law. A state court may avoid a federal court decision striking down a provision of state law by giving that provision an appropriate narrowing construction. All of this is unexceptional. However, during oral argument on the post-judgment intervention motion the district court expressed a more sweeping view on the power of state courts to ignore federal decisions not just about state law, but federal law. The district court suggested that even if the Arizona state courts were to interpret Article XXVIII exactly as the federal court had interpreted it, the Arizona courts would not be bound to follow the federal court decision that it is unconstitutional, because only decisions of the United States Supreme Court can bind the states on questions of federal law. We address this view below, *infra* at 737.

also denied the Attorney General's motion to intervene under 28 U.S.C. § 2403(b). Section 2403(b) authorizes intervention by a state attorney general in actions "to which [the] State or any agency, officer, or employee thereof is not a party." The district court noted that although the Governor had not appealed, she remained a party. Accordingly, the court concluded that section 2403(b) is not applicable. These timely appeals of the denial of the motions to intervene followed.

STANDARD OF REVIEW

We review the denial of a motion to intervene. *Waller v. Financial Corp. of America*, 828 F.2d 579, 582 (9th Cir.1987). The district court's determination ***731** of timeliness, however, is reviewed only for an abuse of discretion. *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir.1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987).

DISCUSSION

I. AOE and Park

AOE and Park contend that they have a right to intervene on appeal under Fed.R.Civ.P. 24(a) ("Intervention of Right"). Rule 24 of the Federal Rules of Civil Procedure confers a right to intervene "[u]pon timely application" when: the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Fed.R.Civ.P. 24(a)(2). In *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir.1983), we interpreted Rule 24(a) to require the granting of a motion to intervene at the outset of litigation if four criteria are met: (1) timeliness; (2) an interest in the subject matter of the litigation; (3) absent intervention the

party's interest may be practically impaired; (4) other parties inadequately represent the intervenor. *Id.* at 527.

In order for an individual to intervene in ongoing litigation between other parties, he need only meet the *Sagebrush Rebellion* criteria. However, where no party appeals, the "case or controversy" requirement of Article III also qualifies an applicant's right to intervene post-judgment. In *Legal Aid Soc'y. of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir.1979), cert. denied, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980), we restated the rule that "post-judgment intervention for purposes of appeal may be appropriate if the intervenors ... meet traditional standing criteria." *Id.* at 1328 (citations omitted). As the Supreme Court stated in *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986), "[a]lthough intervenors are considered parties entitled, among other things, to seek review ... an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Id.* at 68, 106 S.Ct. at 1706 (citation omitted; emphasis added). This requirement assures the jurisdictional prerequisite of a live "case or controversy."

As we explained in *Brennan*, once the party defendants have "acquiesced in the judgment against them," as the Governor did here, applicants "must demonstrate such a stake in the outcome of an appeal that a live Article III case or controversy remains for appellate resolution." *Brennan*, 608 F.2d at 1328 n. 6. Therefore, an interest strong enough to permit intervention with parties at the onset of an action under Rule 24(a) is not necessarily a sufficient basis for intervention after judgment for the purpose of pursuing an appeal which all parties have abandoned. In *Brennan* we cited a commentator to illustrate this jurisdictional limitation:

A distinction between standing to intervene and to appeal makes particular sense when the "case or controversy" limitation on the federal judicial power is recalled. Adding C to the litigation between A and B may pose no problems under Article III of the Constitution, but permitting C to be the sole adversary of B on appeal, when his interest in the case may be only in its value as precedent, certainly does give difficulty since there is no real controversy between A and C. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv.L.Rev. 721, 753-54 (1968) (cited with approval in *Brennan*, 608 F.2d at 1328 n. 9). Hence, before assessing whether AOE and Park meet the *Sagebrush Rebellion* criteria, we must first decide whether permitting them to intervene on appeal would be consistent with the requirements of Article III.

A. Article III Standing

AOE and Park can meet the Article III "standing criteria by alleging a threat ***732** of particularized injury from the order they seek to reverse that would be avoided or redressed if their appeal succeeds." *Brennan*, 608 F.2d at 1328. AOE and Park contend, as they did in the district court, that they satisfy this test because, as the sponsors of Article XXVIII, they will be injured by its nullification. The district court held that this "abstract" interest is insufficiently concrete to satisfy Article III. Yniguez urges us to adopt the district court's reasoning, citing *Diamond v. Charles*.

In *Diamond*, a private physician had intervened at the trial level in an action to enjoin enforcement of an Illinois statute restricting the performance of abortions. After the Court of Appeals affirmed a permanent injunction against the enforcement of the statute, the state decided not to appeal. The private physician, claiming that he had an interest in seeing Illinois' laws enforced, attempted to appeal to the United States Supreme Court. The Court held that he lacked

standing because although he had "an interest" he lacked a "direct stake [ ] in the abortion process." 476 U.S. at 66, 106 S.Ct. at 1706.

From *Diamond*, Yniguez would have us conclude that a mere "philosophical interest in the outcome of litigation is insufficient to confer a right to appeal." While we agree with this statement, we reject the suggestion that AOE and Park are mere " 'concerned bystanders,' who will use [the appeal] simply as a 'vehicle for the vindication of value interests.' " *Diamond*, 476 U.S. at 62, 106 S.Ct. at 1703 (*quoting Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972); *United States v. SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973)). We find that AOE's and Park's interest in Article XXVIII is qualitatively distinct from the physician's interest in the Illinois abortion law at issue in *Diamond*. Unlike the physician, neither AOE nor Park is a mere "private citizen." 476 U.S. at 64, 106 S.Ct. at 1704. As the principal sponsors of Article XXVIII, their relationship to Article XXVIII is closely analogous to the relationship of a state legislature to a state statute. It is therefore useful to consider the law of legislative standing.

In *Karcher v. May*, 484 U.S. 72, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987), the Supreme Court held that state legislators who intervened in their official capacities to defend a lawsuit challenging the constitutionality of a statute that had been enacted over the Governor's veto did not have standing once they were out of office. But in arriving at that decision, the Court clearly indicated that jurisdiction had been proper in the district court and the court of appeals so long as the legislators held office, notwithstanding the fact that the Attorney General had declined to defend the suit. See *id.* at 72-73, 108 S.Ct. at 390-91. As Justice White pointed out in his concurrence in the judgment, by allowing

the legislators to intervene to defend the suit when the state executive did not wish to assert the statute's constitutionality, the Court "acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court." *Id.* at 84-85, 108 S.Ct. at 396. Furthermore, as the Court recognized over a half century ago, state legislators claiming that their votes "have been overridden and virtually held for naught" by an Executive decision have a sufficient stake in the outcome under Article III to vindicate their interests in federal court. *Coleman v. Miller*, 307 U.S. 433, 438, 59 S.Ct. 972, 975, 83 L.Ed. 1385 (1939) (holding that 20 state senators who voted against ratification of a federal constitutional amendment had standing to challenge the state lieutenant governor's legal authority to cast the deciding vote in favor of the amendment).[2]

***733** It is therefore clear that were Article XXVIII a statute

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[2]Also relevant in this regard is *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In a section of the opinion in that case captioned "Case or Controversy" the Court stated that where the Executive Branch agreed with Chadha that the challenged statute was unconstitutional, Congress' defense of the statute on appeal guaranteed the "concrete adverseness" required by Article III. *Id.* at 939, 103 S.Ct. at 2778. The Court summarized its prior cases thus: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id.* at 940, 103 S.Ct. at 2778. Although the question whether individual members of Congress have standing to sue seeking enforcement of a federal law is an open one, *see Burke v. Barnes*, 479 U.S. 361, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987), the separation of powers issues raised by that question are not implicated in this case.

rather than a ballot initiative, the Arizona legislature would have standing to defend its constitutionality.[3] AOE argues that as the principal sponsor of the initiative, it stands in an analogous position to a state legislature. We agree. The official sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned. The district court's decision striking down Article XXVIII essentially nullified the considerable efforts AOE made to have the initiative placed on the ballot and to obtain its passage. *Cf. Coleman v. Miller, supra*, 307 U.S. at 439, 59 S.Ct. at 975.

Arizona law recognizes the ballot initiative sponsor's heightened interest in the measure by giving the sponsor official rights and duties distinct from those of the voters at large. *See, e.g.,* Ariz.Rev.Stat.Ann. § 19-111 ("person or organization intending to propose a law or constitutional amendment by petition" must file an application with the secretary of state); § 19-122 (if the secretary of state rejects a petition for a ballot initiative, he must provide the sponsor with a written statement of reasons for doing so); § 19-124 (sponsor may submit an argument in favor of the initiative at the time the application is filed).

Moreover, as appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative; for better or worse, the people generally resort to a ballot

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[3]That the Supreme Court allowed legislative standing in the cases we have discussed shows that legislative standing is appropriate both under Article III and the prudential standing rules the Court has articulated. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979).

initiative precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with respect to a particular subject. While the people may not always be able to count on their elected representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so.

Finally, it is worth noting that there is a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to Fed.R.Civ.P. 24(a). *See infra*, part I.B.2. While the interest required to intervene under the Rule is not identical to the interest required for standing under Article III, there are substantial similarities between the two. For the reasons we have already given, the added interest necessary to confer Article III standing--a particularized injury that distinguishes AOE from "concerned bystanders," , 476 U.S. at 62, 106 S.Ct. at 1703--is present here.

We conclude that AOE, as the sponsor of Article XXVIII, has standing to pursue the instant appeal.[4]

Quite apart from our consideration of AOE's status as

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[4]We do not suggest that the government of Arizona does not also have a sufficient interest in the validity of a provision of the Arizona Constitution to satisfy Article III. Although we need not address the question whether the Attorney General has Article III standing to pursue the present appeal, *see infra* at 737 (holding that Attorney General is estopped from re-entering the case as a party), we may assume that whenever the constitutionality of a provision of state law is called into question, the state government will have a sufficient interest under Article III. We merely point out that in the case of a successful ballot initiative, its sponsor will also have a sufficient interest.

the sponsor of the initiative, we hold that Park, as an individual, has standing under the traditional Article III standards applicable to all private citizens. Yniguez argues that because the district court's decision has not "injured" ***734** Park in a tangible way, the Article III standing requirements are not met. However, when we consider Park's standing as an individual the relevant question is not: has Yniguez injured Park? Rather, because Yniguez brought this case seeking declaratory and injunctive relief, the crucial question for determining whether there is an Article III case or controversy is instead: was there a more than speculative threat that Park was about to bring an action to enforce Article XXVIII against Yniguez? If so, then there was a sufficiently ripe case or controversy between Yniguez and Park to justify an action for declaratory relief. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979) (federal declaratory relief is available "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a [provision of state law], and there exists a credible threat of prosecution thereunder...."); *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir.1989) (because of the risk of self-censorship, a reasonable fear of prosecution for the exercise of first amendment rights was shown where plaintiff alleged that sheriff had conducted preliminary investigation of his activities and others had been indicted for similar activities); *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir.1987) (declaratory relief available because of the chilling effect of obscenity statute).

It is plain from the face of Article XXVIII, that Park

could have sued Yniguez to enforce it.[5] We must now determine whether there was a more than speculative threat that he would do so. As we have indicated, this is a question of ripeness.

Generally the ripeness question on appeal in a declaratory judgment case focuses on whether there was a ripe case or controversy when the suit was initiated. *See Ripplinger*, 868 F.2d at 1047 (discussing reasonableness of the plaintiff's fear of prosecution "at the time of filing [of the] lawsuit"). Because Park was not a party to the action below, the district court made no specific finding as to whether he had threatened to enforce Article XXVIII against Yniguez. However, the Attorney General has attested that Park and AOE did not intervene at an early stage in the proceedings only because they had been expressly assured by the Attorney General that he would vigorously represent their interests. Thus, we may treat AOE's and Park's assertion of their interests in the litigation to the Attorney General as an expression, at the time of the initiation of the proceedings, of their intention to see Article XXVIII enforced against Yniguez. At the outset of litigation, Yniguez therefore could have had a reasonable expectation

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[5]Section Four of Article XXVIII provides for enforcement actions by any "person who resides in or does business in this State." This clearly includes Park, as Yniguez admits. In her brief in this court, Yniguez states that "an action could be instituted by AOE and Park against Kelly Yniguez should they believe her actions violate Article XXVIII." We note that "person" may also include an organization such as AOE. However, because we hold that AOE has standing in the same way that a legislature might, we need not attempt to predict whether the courts of Arizona would entertain a suit brought by AOE to enforce Article XXVIII.

that Park (and possibly AOE as well) would bring an enforcement action against her. As a result, the *United Farm Workers Nat'l Union* requirements are met.

We therefore hold that AOE and Park have standing to appeal.

B. The *Sagebrush Rebellion* Criteria

We next consider the four criteria under Fed.R.Civ.P. 24(a) in turn.

1. Timeliness

The district court found that AOE's and Park's motion to intervene was timely. The court applied the general rule that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal. However, the district court also considered whether the motion was timely in light of the fact that AOE and Park did not move to intervene until after the judgment. The district court noted that AOE's and Park's complaints about the adequacy of the Attorney General's *735 defense of Article XXVIII indicated that they should have intervened during the litigation. The court also noted that AOE and Park did not realize the supposed inadequacy of the Attorney General's defense until very late in the proceedings. The court further acknowledged that an early motion to intervene could have been futile because of the Attorney General's opposition to intervention and his assurances to AOE and Park that he would vigorously defend Article XXVIII. After considering all of these factors, the district court concluded that the motion was timely.

There is no contention that the time that elapsed between the judgment and AOE's and Park's motion was excessive. The only question here is whether AOE and Park should have attempted to intervene before the final judgment in the court below. Although, as the district court noted, the most prudent course for AOE and Park to have followed

would have been to attempt to intervene as soon as they had doubts about the Attorney General's representation, we cannot fault them for relying on that official's assurance that he would defend Article XXVIII fully. Having received that assurance, AOE and Park were not required to monitor the litigation closely to see if the government was asserting a position which, if accepted, could prejudice their interests. Moreover, given the Attorney General's stated view that he would fully defend Article XXVIII, we doubt whether an early motion by AOE and Park to intervene would have been granted, especially if it had been opposed by the Attorney General. Thus, we cannot say that the district court abused its discretion by finding that their motion to intervene was timely.[6]

2. Interest in the Subject Matter of the Litigation

There appears to be a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of the litigation to intervene pursuant to Fed.R.Civ.P. 24(a). As we stated in *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983), because "[r]ule 24 traditionally has received a liberal construction ... the public interest group that sponsored the initiative [is] entitled to intervention as a matter of right under Rule 24(a)." *Accord Sagebrush Rebellion*, 713 F.2d at 527-28. Moreover, because the

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[6] It is worth recalling that the district court dismissed all the defendants except the Governor at the same time that it decided the merits. Thus, AOE and Park were first alerted to the inadequacy of the state's representation of its interests when the district court decided the merits. As we have stated, there is no contention that they did not act in a timely fashion after learning of that decision.

Article III standing requirements are more stringent than those for intervention under rule 24(a), *see supra*, p. 731-32, our determination that AOE and Park have standing under Article III compels the conclusion that they have an adequate interest under the rule.

3. Practical Impairment Absent Intervention

Yniguez argues that AOE's and Park's interests are not impaired by the district court's decision because they retain the right to sue in state court to enforce Article XXVIII. Yniguez correctly notes that the district court's decision is not res judicata with respect to AOE and Park. As the Supreme Court has stated, "[i]t is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989) (*quoting Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940)). However, this principle is not dispositive, because the question here is whether the district court's decision will result in practical impairment of the interests of AOE and Park, not whether the decision itself binds them.

Yniguez next contends that the district court's judgment is no impediment to AOE ***736** and Park because it is not a binding precedent on the state courts. All parties agree that it is not binding in the sense that the courts of Arizona are free to place a different interpretation on Article XXVIII and thereby render it constitutional. That is, there is no dispute that the Arizona courts are the definitive expositors of Arizona state law. However, Yniguez' argument goes one step further. She contends in her brief that even assuming that the district court correctly understood the meaning of Article XXVIII, its decision that

Article XXVIII is unconstitutional as a matter of federal law has no stare decisis effect in the Arizona state courts.[7] The district court also took this narrow view of the effect of its decision. *See supra*, p. 730 & n. 1. AOE and Park contend that the view advanced by Yniguez in her brief, and accepted by the district court, overstates the power of state courts to ignore decisions of the lower federal courts.

The view that decisions of the lower federal courts on questions of federal law do not bind the state courts has gained considerable acceptance in the academic literature.[8] It has also been expressed by some state courts, although others

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[7]At the oral argument, Yniguez appeared to retreat from her categorical view. In any event, we note that there is considerable irony in the position Yniguez took on this issue in her brief. We may assume that she brought her suit in the hope of obtaining a broad declaration that Article XXVIII is unconstitutional on its face and therefore may not be applied constitutionally to anyone. That is, after all, precisely what the district court held. Having prevailed in the district court Yniguez argued in her brief that we should declare that all she really won is an extremely narrow ruling that Article XXVIII cannot be constitutionally applied to her by the state, the Governor, or the Attorney General, but that private parties are free to enforce it against her, and both official and private parties may enforce it against anyone else.

[8] *See, e.g.*, Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv.L.Rev. 1130, 1231 n. 495 (1986); Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw.U.L.Rev. 759, 771 (1979); Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1053 (1977).

have expressed the opposite view.[9] And while the Supreme Court has never squarely faced the question, several individual justices have stated that principles of federalism require that the state courts be treated as coordinate and coequal with the lower federal courts on matters of federal law.[10]

Despite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view. Having chosen to create the lower federal courts, Congress may have intended that just as state courts have the final word on questions of state law, the

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[9] *Compare Bradshaw v. State*, 286 So.2d 4, 6 (Fla.1973), *cert. denied*, 417 U.S. 919, 94 S.Ct. 2626, 41 L.Ed.2d 225 (1974) ("It is axiomatic that a decision of a federal trial court, while persuasive if well-reasoned, is not by any means binding on the courts of a State"); *State v. Coleman*, 46 N.J. 16, 35-38, 214 A.2d 393, 403-05 (1965), *cert. denied*, 383 U.S. 950, 86 S.Ct. 1210, 16 L.Ed.2d 212 (1966); *Iowa Nat'l Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930), *with Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (1935); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725 (1918).

[10] *See Steffel v. Thompson*, 415 U.S. 452, 482 n. 3, 94 S.Ct. 1209, 1227 n. 3, 39 L.Ed.2d 505 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125, 91 S.Ct. 674, 697, 27 L.Ed.2d 701 (1971) (Brennan, J., joined by White and Marshall, JJ., dissenting) (referring only to "the persuasive force" of a decision of a lower federal court on state courts). *See also Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir.), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1970) (holding that federal district court's decision on question of federal law was not a binding precedent for the Illinois courts).

federal courts ought to have the final word on questions of federal law. The contrary view could lead to considerable friction between the state and federal courts as well as duplicative litigation. Furthermore, the sparse authority on the subject appears to be concerned largely with the *stare decisis* effect of federal district court decisions on subsequent state court actions, rather than the effect of decisions of the federal courts of appeals; there may be valid reasons not to bind the state courts to a decision of a single federal district judge--which is not even binding on the same judge in a subsequent *737 action--that are inapplicable to decisions of the federal courts of appeals. Finally, if decisions of the federal courts of appeals invalidating state laws carry no authority, it would be difficult to comprehend why for so many years a right of appeal to the Supreme Court was provided in all cases in which federal circuit courts held state statutes unconstitutional. *See* 28 U.S.C.A. s 1254(2) (West 1979).[11] In any event, we may assume without deciding that an unappealed judgment of the district court would have no precedential weight in the Arizona courts, for even under this assumption, we find that the interests of AOE and Park are practically impaired by the decision.

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[11] Congress eliminated the provision for such appeals in 1988. *See* Supreme Court Case Selections Act, Pub.L. 100-352 (1988); 28 U.S.C.A. s 1254(2) (West Supp.1990). However, the repeal was not the result of a determination by Congress that decisions of the federal courts of appeals invalidating state laws are without binding force. Rather, it was part of an Act eliminating nearly all of the Supreme Court's mandatory jurisdiction in response to the Court's unanimous request that Congress make its jurisdiction discretionary whenever possible. H.R.Rep. No. 100-660, 100th Cong., 2d Sess., 2, *reprinted* in 1988 U.S.Code Cong. & Admin.News 766, 767.

There is no dispute that the declaration that Article XXVIII is facially invalid binds Governor Mofford and her successors in any actions against Ms. Yniguez. This fact alone suggests that the interests of AOE and Park have been practically impaired. Moreover, there is at least some uncertainty as to whether it would also bind the Governor of Arizona in enforcement suits against defendants other than Ms. Yniguez. *Compare H.L. v. Matheson*, 450 U.S. 398, 406, 101 S.Ct. 1164, 1169, 67 L.Ed.2d 388 (1981) (stating categorically that an unappealed ruling of a federal district court is binding on a state party), *with United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984) (holding that non-mutual offensive collateral estoppel may not be applied against the federal government). As a result, Arizona's Governor may hesitate to take any steps to implement Article XXVIII. Indeed, the Attorney General has represented to this court that in light of the district court's decision, he believes that any enforcement of Article XXVIII would be of questionable legality, and we cannot fault him for his willingness to abide by a federal court's declaration that the provision is unconstitutional. Yet Article XXVIII places an affirmative duty on that official to "take all reasonable steps to preserve, protect and enhance the role of English as the state's official language." The district court's decision casts a cloud over the state's power to enforce Article XXVIII. While it may have left AOE's and Park's right to sue intact, a right to bring a private enforcement action is not a complete substitute for executive enforcement and implementation. Hence, as a practical matter, the district court's ruling substantially weakened Article XXVIII, and thereby impaired the interest of AOE and Park.

Furthermore, even if we assume that the district court's ruling has no binding effect on the Arizona courts, we cannot wholly overlook the fact that jurisprudential concerns

might cause those courts to find the reasoning of the district court more persuasive than they might otherwise find a similar argument to be, and that they might choose to accept the district court's reasoning to avoid confusion, lack of finality, and disrespect for law. *See Commonwealth v. Negri*, 419 Pa. 117, 121-22, 213 A.2d 670, 672 (1965). In any event, the district court's opinion will have impaired AOE's and Park's interests in the vitality of Article XXVIII.

4. Inadequacy of Representation by Other Parties

Having decided not to appeal the district court's decision on the merits, the Governor inadequately represents the interests of AOE and Park. Moreover, as we hold below, the Attorney General is estopped from re-entering this litigation as a party. *See infra*, p. 738. Thus, absent an appeal by AOE and Park, no party will be able to assert Article XXVIII's constitutionality. Because no representation constitutes inadequate representation, the fourth *Sagebrush Rebellion* criterion is met.

***738** Furthermore, even if the government were a party to this appeal, that would not ensure adequate representation of the interests of AOE and Park. The Attorney General has issued an opinion narrowly construing Article XXVIII. In his view, the English-only requirement applies solely to official acts of the Arizona government, and does not prohibit the use of languages other than English by state personnel such as Yniguez. The district court rejected the Attorney General's proffered construction because it is not binding on the Arizona courts and because, in the view of the district court, it contradicts the plain language of Article XXVIII. By contrast with the Attorney General, AOE and Park agree with the district court that Article XXVIII should be construed broadly, although they disagree with the court that the provision so construed is unconstitutional. In any event, at this stage in the proceedings it is clear that the

Attorney General would not represent the views of AOE and Park adequately.

II. The Attorney General's Intervention Motion

Attorney General Corbin claims a right to intervene under Fed.R.Civ.P. 24(a) and 28 U.S.C. § 2403. Because we hold that there is an Article III "case or controversy" between Yniguez (on the one hand) and AOE and Park (on the other), we need not address the question whether the Attorney General would have standing to appeal under Article III if no other party were willing and able to appeal. Thus, we turn directly to his claims under Rule 24(a) and section 2403.

A. Rule 24(a)

We note initially that the Attorney General did not contend in the district court that his putative right to intervene was located in Rule 24(a). The sole basis for his intervention motion in the court below was section 2403. Thus, we have serious doubts whether his claim under Rule 24(a) is properly before us. Even if it is, however, we find that having argued in the district court that he should not be a party, the Attorney General is estopped from now arguing that he should be.

As we explained in *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir.1990), "'[t]he doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process.' " (*quoting, Religious Technology Center v. Scott*, 869 F.2d 1306, 1311 (9th Cir.1989) (Hall, J., dissenting)). Although "'most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one,' " *id.*, it applies more generally as well. In *Russell*, for example, we applied the

discretionary estoppel doctrine to preclude inconsistent legal assertions.

This case is ideally suited for the application of judicial estoppel. From the fact that we have estopped litigants from asserting mere arguments that are inconsistent with arguments on which they prevailed in the district court, it follows *a fortiori* that we will not allow a party to seek an outcome directly contrary to the result he sought and obtained in the district court. Yet that is precisely what the Attorney General is attempting to do here. The Attorney General represented to the district court that he did not wish to be a party to this litigation, presented arguments in support of that position, and persuaded the district court to rule in his favor on that point. Only after the district court granted the Attorney General's request and then reached a result on the merits with which the Attorney General disagreed did that official decide that he would rather be a party after all. We will not accept such a reversal in position.

Nor is the Attorney General's about-face excused by the Governor's decision not to appeal. Governor Mofford's position on Article XXVIII was well known at the outset of this litigation. Nonetheless, the Attorney General presented separate arguments to the district court in support of ***739** dismissing the case against each individual defendant. The Attorney General should have realized that the district court might accept some but not all of these arguments, and should have made his tactical decisions accordingly.

Finally, the Attorney General argues that he is entitled to intervene as a party because no prejudice to Yniguez would result from his intervention. Were we to hold that AOE and Park could not intervene this argument would surely be incorrect. In such circumstance, allowing the Attorney General to intervene would mean that there would be an appeal of an otherwise unappealable judgment in

Yniguez' favor. Certainly this would prejudice Yniguez. Moreover, even in light of our decision that AOE and Park may appeal, the Attorney General's prejudice argument misses the point. The principal concern of the doctrine of judicial estoppel is the integrity of the judicial process. The district court expended valuable judicial resources evaluating and granting the Attorney General's request that he be dismissed from the suit. We will not render that expenditure for naught simply because subsequent circumstances, all of which were foreseeable, caused the Attorney General to change his mind.

B. Section 2403(b)

[11] 28 U.S.C. § 2403(b) provides: In any action, suit or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall ... permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The district court held that the instant case is not an action to which an officer of the state is not a party because the Governor is a party, albeit one who has not chosen to appeal. We consider this an overly narrow reading of the statute. Section 2403(b) entitles the Attorney General to make an argument in a "proceeding" to which no representative of the state is a party. Having failed to file a notice of appeal, and having accepted the district court's decision on the merits, the Governor cannot realistically be considered a party to an appeal by AOE and Park. The Governor is no longer in any sense a participant. Moreover, whether or not the Governor technically remains a party, the simple fact is that unless we allow the Attorney General to make his argument we will have to pass judgment on the constitutionality of a provision

of Arizona law without hearing the views of the state of Arizona. That result would be contrary to both the letter and the spirit of section 2403(b).

From the face of section 2403(b) it is apparent that the Attorney General may intervene on appeal, but only to the extent that the section permits. The statute confers a right to intervene in any "court of the United States," a phrase which includes a circuit court of appeals. *See Wallach v. Lieberman*, 366 F.2d 254, 258 n. 9 (2d Cir.1966) (noting that intervention under section 2403(b) is appropriate at any stage of the proceedings) (*citing Glidden Co. v. Zdanok*, 368 U.S. 814, 82 S.Ct. 56, 7 L.Ed.2d 22 (1961)). However, contrary to the Attorney General's contention, section 2403(b) confers only a limited right upon him. Under that section, the Attorney General is permitted to make an argument on the question of constitutionality, but he is given no right to appeal as a party. Before the Attorney General can assert any right at all there must be a viable proceeding in which that right may be asserted. It is only because we hold that AOE and Park may appeal that we conclude that there is such a proceeding and that the Attorney General may, therefore, pursuant to section 2403(b), make an argument regarding constitutionality.[12]*740

Finally, we note that there is no inconsistency between our determination that the Attorney General may make an argument about the constitutionality of Article

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[12]It is worth mentioning that Yniguez' attorney stated during oral argument that if we were to hold that AOE and Park have a right to appeal, he would not object to the Attorney General's participation in the appeal as well. However, our decision that the Attorney General has a right to intervene under section 2403(b) does not depend on this concession.

XXVIII and our decision that he is estopped from claiming a right to appeal as a party. We emphasize that under section 2403(b) the Attorney General is not a party. His right to argue the constitutionality of Article XXVIII is contingent upon AOE and Park's bringing the appeal at issue. So long as there is such an appeal he may file a brief and participate in the oral argument, but having asked the district court to dismiss him as a party, he cannot now become one again. Should AOE and Park cease to be parties to this action for any reason, the Attorney General will have no right to complain.[13]

CONCLUSION

The district court's denial of the intervention motion of AOE and Park is reversed. The district court's denial of the Attorney General's intervention motion is affirmed insofar as the Attorney General sought to be designated a party to this appeal and reversed insofar as he seeks to make an argument as to the constitutionality of Article XXVIII pursuant to 28 U.S.C. s 2403(b). We shall retain jurisdiction

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[13]As we have noted, the Attorney General has taken a somewhat narrower view of the effect of Article XXVIII than the view taken by AOE. In pursuing the question of constitutionality the Attorney General will necessarily argue questions of interpretation of the state provision at issue. Our holding that section 2403(b) should be narrowly construed with respect to the Attorney General's status should not be taken as an indication that we would similarly limit the scope of his argument. To the contrary, we think the court will benefit from receiving the widest range of views on the important issues presented in this case, including the proper meaning of Article XXVIII.

over the appeal of the district court's decision on the merits.[14]

AFFIRMED IN PART AND REVERSED IN PART.

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[14]Yniguez has requested attorneys' fees under 42 U.S.C. § 1988. Because we have not yet heard the appeal on the merits we do not know whether she is a prevailing party entitled to attorneys' fees. We will decide that question after we decide the merits.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[redacted]

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
50 U. N. Plaza, Rm. 59
San Francisco, CA 94102-4909
August 14, 1991

USDC, Phoenix
District of Arizona (Phoenix) U.S. Courthouse
230 N. First Ave., Room 1400
Phoenix, AZ 85025

C.A. No.	TITLE	AGENCY/D.C. No.
90-15546	Yniguez v. State of Arizona	CV-88-1854-PGR
90-15581	Yniguez v. Mofford	CV-88-1854-PGR

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

[x] Certified copy of the Decree of the Court
[ ] Judgment of the National Labor Relations Board
[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Sylvia McAlister
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Initial Address Omitted]

[Caption Omitted]

_____)

Nos. 90-15546 and 90-15581

SUGGESTION OF MOOTNESS

Maria-Kelly F. Yniguez, appellee in the captioned matter and plaintiff below, is no longer employed by the State of Arizona and has not been so employed since April 20, 1990. (See attached affidavit of Rosanne Ruelas and resignation letter of Maria-Kelly F. Yniguez.) In light of this development, the state suggests that this case may lack a viable plaintiff and, hence, may be moot. While preserving its right to make appropriate motions, the state requests that this Court inquire into the status of the plaintiff/appellee and the case.

Respectfully submitted this 12th day of September, 1991.

GRANT WOODS
Attorney General
REBECCA W. BERCH
Solicitor General
Attorneys for Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Initial Address Omitted]

[Caption omitted]

INTERVENORS/APPELLANTS ROBERT D. PARK AND ARIZONANS FOR OFFICIAL ENGLISH RESPONSE TO SUGGESTION OF MOOTNESS

[2]

This matter came before the Court on a "Suggestion of Mootness" by the Attorney General of the State of Arizona filed on September 12, 1991. Appellants Arizonans for Official English and Robert Park[1] (jointly "AOE" or "the initiative proponents") are the only defendants/appellants remaining in the case, having successfully intervened for purposes of taking their appeal. __ F.2d __, 1991 WL 130300 (9th Cir. July 19, 1991). The underlying case is reported as Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990).

Appellants are awaiting a briefing schedule from the Court for further proceedings. Preliminary matters awaiting action by the Court are the recall of the Mandate and whether the Clerk of the Court should return the record to the District Court, given the Court's statement: "We shall retain jurisdiction over the appeal of the district court's decision on the merits." Slip Op. 12.

This memorandum responds to the "Suggestion of

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[1]Appellants have notified both the Clerk and West Publishing Co. that the caption of the case as reported erroneously recites Mr. Park's name as "Parks" (i.e., plural). The Court's opinion accurately names Mr. Park (singular).

Moctness," noting that the Suggestion overlooked two [3] important points concerning mootness and that the Court, if it finds the appeal moot, should vacate the lower court's decision and consider sanctioning counsel who concealed information from the Court.

MOOTNESS

The concept of mootness is rooted in the "case and controversy" requirement of Article III of the United States Constitution. DeFunis v. Odegaard, 415 U.S. 908 (1974). The Supreme Court informs us that, for Article III purposes, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally recognizable interest in the outcome." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (emphasis added).

MISSED POINT I - THE POSTURE OF THE PARTIES

Unlike in private disputes, mootness in controversies involving the constitutionality of public laws is not an easy determination. On the one hand, the Supreme Court counsels restraint, as in United States v. W.T. Grant Co., 345 U.S. 629, 631 (1953). (" ... [T]o say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right .... The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.").

On the other hand, the Court is unwilling to entertain cases where the actual parties are willing to allow the dispute to rest. Karcher v. May, 484 U.S. 72, [4] 83-84 (1987) ("This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party ... declined to pursue its appeal."). The "losing party" here wants to continue the appeal. AOE is the losing party, as this Court noted: "The District Court's decision striking down Article XXVIII essentially nullified the

considerable efforts AOE made to have the initiative placed on the ballot and to obtain its passage." Slip Op. 5.

The "Suggestion of Mootness" misses this point. The question in a public law mootness case is not only whether there is a "viable plaintiff," "Suggestion of Mootness," 1, but whether the Court believes the case can go on as a case or controversy.

For example, in Allee v. Medrano, 416 U.S. 802, 810 (1974), the Supreme Court allowed a labor union to continue an otherwise moot case against government harassment, saying:

> Nor can it be argued that the case has become moot because appellees have abandoned their efforts as a result of the very harassment they sought to restrain by this suit. There can be no requirement that appellees continue to subject themselves to ... unlawful restrictions upon their liberties throughout the pendency of the action in order to preserve it as a live controversy. In the face of appellants' conduct, appellees sought to vindicate their rights in the federal court .... We may not assume that because during this period they directed their efforts to the judicial battle, they have abandoned their principal [5] cause. Rather, the very purpose of the suit was to seek protection of the federal court so that the efforts at unionization could be renewed.

AOE does not believe that Yniguez suffered any such treatment (nor, as will be shown below, does Yniguez's own application of the law matter in this case). Yet, the situation is analogous. Yniguez requested damages and seems to feel her equal protection argument (necessary for the finding of damages) is still alive. See, e.g., Plaintiff's Response to Motion

to Intervene of (...OE), Pp. 4-5 ("alternative claim based upon denial of equal protection.")

Thus, and especially in light of the discussion below on Ms. Yniguez's continuing role as an active representative of a group interested in this case, the "Suggestion of Mootness" misses the essential element of mootness.

MISSED POINT II - THIS IS AN OVERBREADTH CASE

The "Suggestion of Mootness" also misses the essential point about the lower court's decision – this is a case in which Yniguez's own rights are no longer at issue. As the District Court put it:

> The court's determination of Article XXVIII's facial validity is not dependent upon Yniguez having a First Amendment right to speak a language of her choice during the performance of her official duties .... All the Court ... does find in this regard, is that Article XXVIII is so broad as to inhibit the constitutionally protected speech of third parties.- ...When read at its full literal breadth, Article XXVIII would force Arizona [6] governmental officers and employees whose use of a non-English language in the performance of their official duties is protected by the First Amendment, such as state legislators speaking to constituents in a language other than English, state employees officially commenting on matters of public concern in a language other than English, and state judges performing marriage ceremonies in a language other than English, to either violate their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits, or to

curtail their free speech rights.

730 F. Supp. at 314 (emphasis added).

There are circumstances in which overbreadth cases can be pursued by persons who may have lost the character which allowed them to bring the original suit. 13A Wright, Miller & Cooper, Federal Practice and Procedure, § 3533.9, at 406 (1984). Overbreadth cases are one such circumstance. In Fox v. Board of Trustees of State Univ. of New York, 764 F. Supp. 747, 755-56 (N.D.N.Y. 1991), for example, a district court assumed, "arguendo that an overbreadth challenge would operate to defeat plaintiffs' apparent mootness problem," but rejected the claim because no court (in nine years of litigation) had ever held plaintiffs to have been operating as representatives. In this case, on the other hand, the District Court found that the constitutional claim operated specifically as to third parties.

And no one can fault Yniguez for her zealous advocacy. Some nine months after resigning, her counsel [7] vigorously and competently represented her claim to this Court in oral argument. Since she is apprently capable of and willing to continue her representation under the overbreadth doctrine, she should be allowed to do so.

NECESSARY POST-MOOTNESS CONSIDERATIONS

If, despite the foregoing points, this Court decides to declare this controversy moot, the Court should do two things:

First, the Court must vacate the lower court decision. This situation requires a classic application of the rule in United States v. Munsingwear, 340 U.S. 36 (1950). If the defendant requests the Court to do so, the Court must vacate a moot lower Court decision and remand the case for dismissal. AOE respectfully so requests the Court. Since this case would be unreviewable solely because of mootness, and through no action of AOE, the lower court decision should not be allowed

to spawn any legal consequences. 340 U.S. at 39. See also, City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288 n.9 (1982).

Second, the Court should consider whether, in light of its finding on mootness, Yniguez and her counsel are liable to AOE for its costs or for sanctions. Fed. R. Civ. Pro. 11; 8 U.S.C. § 1927. It is the continuing duty of an attorney to inform the Court of events that may moot a case. Board of License Commrs. v. Pastore, 469 U.S. 238, 240 (1985) ("without delay"; emphasis in original). [8] "This part of the essential trust that judges place in attorneys who come before the bench." Van Bourg, Allen, Weinberg, & Roger v. NLRB, 762 F.2d 831, 832-33 (9th Cir. 1985).

In addition, AOE respectfully suggests that this Court allow additional briefing and a hearing before declaring this case moot. The Supreme Court used this procedure in considering whether a recent language-related case was moot. Russoniello v. Olagues, 481 U.S. 1012 (1987).

Respectfully submitted this 20th day of September, 1991.

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Attorneys for Intervenors/Appellants Robert D. Park;
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Initial Address Omitted]

[Caption Omitted]

APPELLEE YNIGUEZ'S RESPONSE REGARDING MOOTNESS CONSIDERATIONS

Factual Background and Procedural History

The underlying action was initiated by Appellee Kelly Yniguez seeking, inter alia, declaratory relief adjudicating Article XXVIII of the Arizona Constitution, an "English Only" amendment, to be invalid as violative of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §2000d of the Civil Rights Act of 1964. Joining Kelly Yniguez as a plaintiff in the Second Amended Complaint was Arizona State Senator Jaime Gutierrez. Both plaintiffs sought identical relief. In their Demand for Judgment, plaintiffs sought injunctive and declaratory relief, award of their attorneys' fees and costs, and "all other relief that the Court deems just and proper under the circumstances." Joint Excerpts of Record (hereinafter "EX") , p.138.

Following a trial on the merits, the District Court dismissed Senator Gutierrez as a plaintiff and granted the Arizona Attorney General's Motion to Dismiss both the Attorney General and the Director of the Department of Administration as parties. As a consequence, the only parties remaining to the action were Governor Rose Mofford and Kelly Yniguez. EX, p.163.

The District Court denied the requested injunctive relief and awarded no damages. However, the Court found Article XXVIII to be substantially overbroad in violation of the First

Amendment to [2] the United States Constitution. In so finding, the District Court specifically noted that Kelly Yniguez' standing was:

> predicated in part on her right to assert the unconstitutionality of Article XXVIII on behalf of third parties not before the court whose rights are allegedly chilled by the overbreadth of the Article.

EX, p.153. The District Court also determined that her claim or the overbreadth doctrine was sufficient "to confer standing on her even if her own First Amendment rights are not violated by Article XXVIII." EX, p.154. Pointedly, the District Court consciously determined not to address the additional claims asserted by Kelly Yniguez:

> Given the Court's conclusion that Article XXVIII is substantially overbroad, Yniguez is entitled to a judgment pursuant to 28 U.S.C. §2201 declaring Article XXVIII unconstitutional as violative of the First Amendment. Having so found, the court does not reach the plaintiffs' claims that Article XXVIII also violates the Fourteenth Amendment and 42 U.S.C. §2000d.

EX, p.162. Neither Kelly Yniguez nor Governor Mofford, the only defendant remaining and bound by the judgment, appealed.

However, after Governor Mofford publicly announced her intention not to appeal the judgment, leave to intervene postjudgment for the purposes of "taking an appeal" was sought by Arizonans for Official English and Robert D. Park (hereinafter "AOE"). In addition, the Attorney General sought to reinsert himself into the proceedings for the purpose of pursuing an appeal. These motions were denied by the District Court. The Order denying the motions for leave to intervene

was appealed to [3] this court.[1]

This Court's opinion in this matter affirmed in part and reversed in part the District Court's decision on intervention. Pursuant to this Court's opinion, a mandate issued on August 14, 1991. The ultimate effect of the Mandate and this Court's Opinion is to permit AOE to file a Notice of Appeal challenging the merits of the District Court judgment.

On September 12, 1990, the Arizona Attorney General served a "Suggestion of Mootness" premised upon Ms. Yniguez' April 25, 1990 resignation from employment with the State of Arizona. No relief was sought except an inquiry into "the status of plaintiff/appellee and the case."[2] AOE responded

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[1]After AOE and the Attorney General filed Notices of Appeal from the trial court's decision denying their requests for leave to intervene, Senator Jaime Gutierrez, dismissed as a plaintiff by the trial court's final judgment, also filed a Notice of Appeal. A copy of that Notice is attached hereto as Exhibit A. The pendency of Senator Gutierrez' appeal was specifically raised following a pre-briefing conference held June 20, 1990. See Exhibit B hereto. As noted in the Statement of Related Cases filed by Kelly Yniguez in connection with her Answering Brief, Exhibit C hereto, which was filed belatedly due to inadvertence (see Exhibit D hereto), during a telephonic pre-briefing conference on June 29, 1990, it was agreed that Senator Gutierrez' appeal would be held in abeyance to be consolidated with the instant appeals should briefing on the merits become necessary. As a consequence, his appeal should be consolidated with the expected appeal on the merits to be filed by AOE.

[2]Counsel for Ms. Yniguez did not bring her resignation to this Court's attention because legal research disclosed that this case was not moot. Moreover, Ms. Yniguez' resignation was discussed with the prior counsel of record for the State of Arizona who also agreed this appeal should proceed.

to the Suggestion of Mootness on September 20, 1991. By order dated November 13, 1991, this Court ordered this Repsonse to be filed by [4] Ms. Yniguez.

Legal Argument

I. **KELLY YNIGUEZ CONTINUES TO HAVE A CONCRETE STAKE IN THE OUTCOME OF THE LITIGATION AND HENCE MEETS STANDING REQUIREMENTS.**

A. Ms. Yniguez Retains Unresolved Claims For Damages Which She Is Entitled To Pursue.

Several claims were asserted by both Kelly Yniguez and Senator Gutierrez in their Second Amended Complaint in the District Court (EX, pp.132-138). These claims were based upon the First and Fourteenth Amendments to the United States Constitution as well as 42 U.S.C. §2000d. Each of these claims, when proven, entitle plaintiffs to recover, at a minimum, nominal damages. Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). There, the United States Supreme Court held that, in an action under 42 U.S.C. §1983, even in the absence of proof of actual injury, plaintiffs were entitled to receive nominal damages for deprivation of procedural safeguards under the Fourteenth Amendment:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those

rights be scrupulously observed.

435 U.S. at 266. Of course, this Court also recognizes the availability of nominal damages in civil rights actions. Lokey v. Richardson, 600 F.2d 1265, 1266 (9th Cir. 1979), cert. denied, Richardson v. Lokey, 449 U.S. 884 (1980) (noting that in a §1983 [5] action "regardless of actual damages, appellant could be entitled to nominal damages if he prevailed"). Thus, upon success, the plaintiffs here were entitled to recover at least nominal damages.[3]

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[3]Although plaintiffs' prayer contains no specific request for an award of damages, they do pray for "all other relief that the Court deems just and proper under the circumstances." (EX, p.138, lines 9-10) Such a prayer is deemed sufficient to permit a party to seek money damages. Liberty National Insurance Holding Company v. The Charter Company, 734 F.2d 545, 560 n.31 (11th Cir. 1984) ("Liberty may seek money damages under its prayer for 'such other and further relief as this Court may deem just and proper'"). See also, Rental Development Corporation of America v. Lavery, 304 F.2d 839, 842 (9th Cir. 1962 where this Court declared:

> While applees did not, in their complaint, specifically request cancellation of the lease, they did include the usual prayer for "such other relief as to the Court may seem just and proper."
>
> * * * * *
>
> Where the judgment is not entered by default, the trial court is ordinarily required to grant the relief to which the party in whose favor it is rendered is entitled, "even if the party has not demanded such relief in his pleadings." Rule 54(c), Federal Rules of Civil Procedure, 28 U.S.C.A.

Thus, plaintiffs' Complaint fairly embodied a claim for nominal damages.

The existence of claims for nominal damages obviate any potential mootness. Lokey, supra at 1266; Nakao v. Rushen, 635 F.Supp. 1362, 1364 n.5 (N.D. Cal. 1986) ("However, [plaintiff] would be entitled to nominal damages, which are recoverable under 42 U.S.C. §1983. (citation omitted] Thus, the case is not moot."); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, [6] 81 L.Ed.2d 483, 104 S.Ct. 2576 (1984) where the Supreme Court noted:

> As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute.

467 U.S. at 571. Here, the plaintiffs' claims for nominal damages furnish a concrete interest in the outcome of the litigation obviating any claim of mootness. As a consequence, the Arizona Attorney General's suggestion of mootness should be rejected.

The Orders appealed from below were Orders of the District Court denying AOE's and the Arizona Attorney General's Motions to intervene as parties for the purposes of taking an appeal. Under such circumstances, the proper procedure is to remand this cause to the District Court so that the AOE can perfect an appeal. Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953). Zuber v. Allen, 387 F.2d 862, 863 (D.C. Cir. 1967) (where the court directed the District Court to grant the motion of appellants for leave to intervene to pursue an appeal and required the intervenors to advise the District Court as to their intentions to prosecute an appeal and "if they shall decide to do so, the parties shall work out with the Clerk of this court an expedited briefing and hearing schedule"); Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir. 1944), cert. denied, Poretsky v. Wolpe, 323 U.S. 777 (1944).

One rationale for remanding the cause to the District Court for purposes of permitting the intervenors to file a notice of appeal is evident. At the conclusion of the trial below, [7]

Governor Mofford, the only remaining defendant in the case did not appeal the judgment against her. Since Governor Mofford did not appeal, Ms. Yniguez eschewed her right to appeal notwithstanding the fact that she received no nominal damages or relief under her claims premised on either the Fourteenth Amendment or 42 U.S.C. §2000d. Rule 4(a)(3), Fed.R.App.P. gives any party a right to appeal following timely submission of another appeal by a "party":

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

Here, neither AOE nor the Attorney General were parties entitled to appeal from the final District Court judgment. This Court's recent Order allows them to intervene as "parties" for purposes of taking an appeal. Once a notice of appeal is filed by AOE, Ms. Yniguez also has the right to appeal from the judgment. Because she has claims for nominal damages which have not been resolved, she retains a concrete stake in this litigation. As a consequence, this case is not moot.[4]

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[4]Moreover, at the time the cause is remanded to the District Court to permit AOE to file a Notice of Appeal, Ms. Yniguez could conceivably amend her complaint to add, inter alia, new plaintiffs who are presently bilingual employees of the State of Arizona in positions analogous to that of Kelly Yniguez. These new plaintiffs would accept the contentions previously advanced and argued in this cause without either broadening or modifying those contentions. In the event this Court determines to proceed without remand to the District Court, leave to so amend will be sought from this Court.

[8]B. Ms. Yniquez Continues To Have Standing Under *Broadrick v. Oklahoma* To Challenge The Overbreadth Of Article XXVIII.

During the course of the District Court proceedings, Kelly Yniguez pursued her claims under the First Amendment to the United States Constitution contending, inter alia, that Article XXVIII was facially overbroad. In so doing, Ms. Yniguez raised arguments as to the unconstitutional application of Article XXVII to third parties. The District Court specifically recognize Yniguez's arguments as to the overbreadth of Article XXVII concluding that those arguments alone supported standing:

> The defendants also argue that standing does not exist in this action because Yniguez's claims run afoul of the prudential standing limitation that a plaintiff generally must assert his or her own legal rights and interests. This issue is raised in response to the fact that Yniguez's assertion of standing is predicated in part on her right to assert the unconstitutionality of Article XXVIII on behalf of third parties not before the court whose rights are allegedly chilled by the overbreath of the Article.
>
> * * * * *
>
> Yniguez has alleged a sufficiently colorable claim that Article XXVIII is overly broad in violation of the First Amendment rights of other Arizona government officials and employees not before the court to confer standing on her even if her own First Amendment rights are not violated by Article XXVIII.

730 F.Supp. 309 at 313, EX, pp.153-154. The District Court ultimately determined that Article XXVIII was facially invalid as overbroad in violation of the First Amendment. The

recognized standing of Yniguez to urge the overbreadth doctrine remains intact. See Fox v. Board of Trustees of the State University of [9] New York, 764 F.Supp. 747, 756 (N.D.N.Y. 1991) (assuming that an overbreadth challenge would operate to defeat a claimed mootness problem on appeal but rejecting that argument because the plaintiffs did not invoke the overbreadth doctrine during the course of their litigation.). Having pursued her claims in the District Court in part on behalf of third parties, Kelly Yniguez retains standing to pursue this appeal. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

II. SENATOR JAIME GUTIERREZ HAS CONTINUED STANDING TO PURSUE THIS APPEAL.

The undocketed appeal of Senator Jaime Gutierrez was deferred to be consolidated with this appeal in the event of any consideration of the merits of the judgment entered by the District Court. Since Senator Gutierrez timely appealed, and since Senator Gutierrez also urged the overbreadth of Article XXVIII in the District Court, he has standing to continue this appeal.

Moreover, the trial record unequivocally demonstrates that Senator Gutierrez has an independent "heightened interest" in opposing Article XXVIII sufficient to confer standing on him. His interest is essentially identical to that of AOE – an interest deemed by this Court sufficient to justify post-judgment intervention. As is the case for sponsors of ballot initiatives, Arizona law recognizes the interests of initiative opponents and permits them to submit arguments opposing the initiative. See Ariz.Rev.Stat.Ann. §19-124. In fact, Senator Gutierrez did submit such opposition. See EX, p.056.

[10] As a consequence, just as AOE had a "strong interest in the vitality of a provision of the state constitution which they

proposed,"[5] Senator Gutierrez retains a strong interest in opposing that provision. Moreover, the same Article III considerations that led this Court to conclude that Mr. Park personally meets traditional Article III standards also apply to Senator Gutierrez. Under the circumstances, based on Senator Gutierrez' appeal alone, this action is not moot.

III. THE DISTRICT COURT DECISION SHOULD NOT BE VACATED BECAUSE OF ANY CLAIMED MOOTNESS

Generally, when an appeal is dismissed as moot, the appellate court reverses or vacates the judgment below and dismisses the case. United States v. Munsingwear, Inc., 340 U.S. 36, 39, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950). This practice is, however, subject to several exceptions. One exception is where an appellant has purposely caused dismissal of the appeal as moot. Since a dissatisfied litigant should not be permitted to destroy the consequences of an adverse judgment by eliminating his own right to appeal, in such a case the lower court decision might not be vacated. Under such circumstances, the matter is normally remanded to the District Court to balance competing values and determine whether the judgment should be vacated. Allard v. DeLorean, 884 F.2d 464, 467 (9th Cir. 1989). Here, neither the successful plaintiff nor the only defendant actually aggrieved by [11] the judgment filed any appeal. Thus, the actual parties bound by the judgment were content to permit that judgment to remain binding. Counsel have been unable to locate any similar case permitting post judgment intervention wherein no appeal was filed by the only person bound by an adverse lower court judgment. Under these unique circumstances, in the event of

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[5] Yniguez v. State of Arizona, 939 F.2d 727, 733 (9th Cir. 1991).

any mootness, this Court should remand the cause to the District Court to determine whether the judgment should remain binding.

Conclusion

Appellee Kelly Yniguez remains a party with a concrete stake in the outcome of this litigation based both upon her unresolved claims for damages and her continued recognized standing to pursue claims for unconstitutional overbreadth. Moreover, the appeal cannot be moot due to the timely and proper appeal by Senator Gutierrez, his unquestioned standing under the overbreadth doctrine and the Article III standing he enjoys similar to that previously found by this Court to exist on behalf of AOE. This Court is respectfully urged to enter an order remanding this cause to the District Court for purposes of the filing of any Notices of Appeal by AOE and Yniguez, without prejudice to consideration of any proposed Amendments as the District Court may find itself advised to allow. Following the filing of any Notices of Appeal, the parties should be directed to coordinate an expedited briefing and hearing schedule with the Clerk of this Court.

[12]

DATED this 12th day of December, 1991.

RYLEY, CARLOCK & APPLEWHITE
Robert J. Pohlman
101 North First Avenue, Suite 2600
Phoenix, Arizona 85003-1971.
Attorneys for Plaintiff-Appellee Maria-Kelly F.Yniguez
and Plaintiff-Appellant Jaime P. Gutierrez

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Decision Denying Suggestion of Mootness
975 F.2d 646 (9th Cir. 1992)
Filed September 16, 1992
Reprinted in Appendix to Petition for Certiorari
Beginning at Page 93a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial Address Omitted]

[Caption omitted]

No. CIV-88-1854-PHX-PGR

NOTICE OF APPEAL

Notice is hereby given that Arizonans for official English and Robert D. Park hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the Memorandum Opinion and Order entered in this action on the 6th day of February, 1990, which ordered:

> that Article XXVIII of the Constitution of the State of Arizona is hereby declared to be void as being invalid on its face in violation of the First Amendment of the Constitution of the United States."

and the Judgment entered on the 6th day of February, 1990, which ordered:

> "--- that Article XXVIII of the Constitution of the State of Arizona is declared void as being violative of the Constitution of the United States."

Dated this day of December, 1992.

MEMORANDUM IN EXPLANATION OF PRECAUTIONARY NOTICE OF APPEAL

The foregoing notice of appeal is filed within 30 days of November 5, 1992, of an abundance of precaution to protect the record and the interests of Arizonans for official English and Robert D. Park. The notice may be inappropriate for the

following reasons:

The Ninth Circuit Court of Appeals logged the file in this action out of its court on September 30, 1992, and the United States District Court for the District of Arizona received it on November 5, 1992.

The Circuit Court's last opinion was filed September 16, 1992. The record reflects no mandate issuing thereafter.

That opinion recommended any mootness could be cured by (1) plaintiff Yniguez seeking nominal damages, (2) intervention of a new plaintiff whose claim against the operation of the English only provision is not moot, or (3) Yniguez may have standing if other individuals who are affected by the English only provision did not pursue their claims in reliance on Yniguez's pursuit of her own claim.

As of the date of this notice, no such action has occurred. It appears to Arizonans for Official English and Robert D. Park that the claim of plaintiff Yniguez is in fact moot. The Ninth Circuit Court of Appeals' July 19, 1991, Opinion in No. 90-15546 concluded with the statement:

> "We shall retain jurisdiction over the appeal of the District Court's decision on the merits (Page 8983)."

In recognition of the inaction of plaintiff or anyone in her stead to attempt to cure the mootness suggestion, we believe the Circuit Court's two opinions mandate dismissal of the action on mootness grounds and vacation of the District Court's February 6, 1990, Memorandum Opinion and order and Judgment, both of which declared Article XXVIII of the Arizona Constitution in violation of the First Amendment of the Constitution of the United States.

These parties recommend the United States District Court for the District of Arizona forward this action to the Ninth Circuit Court of Appeals with the recommendation it proceed with dismissal of the action for mootness and its

vacation of the Opinion, Order and Judgment entered herein February 6, 1990, by the District Court.
Respectfully submitted this 3rd day of December, 1992.

SCULT, LAZARUS, FRENCH, ZWILLINGER & SMOCK, P.A.
By: James F. Henderson
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400 East Van Buren Street
Phoenix, Arizona 85004
Attorneys for Arizonans for Official English and Robert D. Park

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Initial Address Omitted]

[Caption omitted]

CIV. No. 88-1854 PHX PGR

NOTICE OF CROSS-APPEAL

Notice is hereby given that Maria-Kelly F. Yniguez, plaintiff above-named, hereby cross-appeals to the United States Court of Appeals for the Ninth Circuit from both the final Judgment and Memorandum Opinion and Order entered in this action on the 6th day of February, 1990.
\\\

DATED this 15th day of December, 1992.

RYLEY, CARLOCK & APPLEWHITE
BY: Robert J. Pohlman
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Phoenix, Arizona 85003
- and -
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Counsel for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

En Banc Decision on the Merits
69 F.3d 920 (9th Cir. 1995)
Filed October 5, 1995
Reprinted in Appendix to Petition for Certiorari
Beginning at Page 1a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARIA-KELLY YNIGUEZ, et al.,)
Plaintiffs,)
vs.)
ROSE MOFFORD, et al.,)
Defendants.)
)

No. CIV 88-1854 PHX PGR

ORDER

The Ninth Circuit Court of Appeals having issued its mandate on October 27, 1995 remanding this matter for the sole purpose of awarding nominal damages to Maria-Kelly Yniguez,

IT IS ORDERED that plaintiff Maria-Kelly Yniguez is awarded one dollar ($1.00) in nominal damages.

Dated this 3rd day of November, 1995.

Paul G. Rosenblatt
United States District Judge

SUPREME COURT OF THE UNITED STATES

64 USLW 3635, 64 USLW 3639

AZ FOR OFFICIAL ENGLISH V. **ARIZONA,** ET AL.
95-974
Supreme Court of the United States
Monday, March 25, 1996

The motion of Equal Opportunity Foundation for leave to file a brief as amicus curiae is granted. The motion of U.S. English, Inc. for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are requested to brief and argue the following questions: (1) Do petitioners have standing to maintain this action? (2) Is there a case or controversy with respect to respondent Yniguez?